

**JUSTICE FOR UNITED STATES  
PRISONERS OF WAR ACT OF 2001**

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**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON IMMIGRATION,  
BORDER SECURITY, AND CLAIMS  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

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ON

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## JUSTICE FOR UNITED STATES PRISONERS OF WAR ACT OF 2001

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WEDNESDAY, SEPTEMBER 25, 2002

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON IMMIGRATION,  
BORDER SECURITY, AND CLAIMS,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Subcommittee met, pursuant to call, at 2:36 p.m., in Room 2237, Rayburn House Office Building, Hon. George W. Gekas, [Chairman of the Subcommittee] presiding.

Mr. GEKAS. The time of 2 o'clock having come and gone and perished, the hearing scheduled for this Committee is now in session, but because of the rules of the House and the subsequent rules of the Committee, we cannot proceed on a total hearing without two Members being present. So unless you want to hear me sing a few songs until the second Member should arrive, we will recess until that Member will arrive.

[Recess.]

Mr. GEKAS. Let the record indicate that the lady from California, Ms. Lofgren, is present, therefore accounting for the necessary number of Members to constitute a quorum. We will begin this hearing with an opening statement by the Chair, and proceed as quickly as we can to hear the testimony from our witnesses.

This issue has been around the corridors of the Congress for a long period of time, and takes on different colorations almost every time we begin discussions on it. As everyone knows, during World War II many Japanese companies, in the production of the war machine of that time, used slave labor in the persons of prisoners of war, American prisoners of war. We all have learned, starting from the Bataan Death March and subsequent thereto that the treatment of our POWs was barbaric. They suffered many different maladies including loss of life actually.

And when that phase of the war simmered down and we were no longer privy through news reports like the ones that came from the Philippines, we learned subsequently that prisoners of war who became housed in Japan were the core of slave laborers to whom we refer now in this particular hearing.

The War Claims Act of 1948 was amended to allow our POWs, this special corps of POWs, to make claim there for compensation for inadequate rations and for inhumane treatment. According to the State Department, individual former POWs who participated in the Bataan Death March and were subsequently used as slave labor, received an average of \$3,000 under the program in addition

to back pay and the other benefits available to them from the Department of Defense. Proponents of this legislation do not believe the benefits provided by the U.S. Government under the treaty were adequate, and that POWs subject to slave labor should be allowed to pursue compensation from the private entities who benefited from their labor so that they could go through the courts.

H.R. 1198 requires any Federal Court, where an action is filed against a Japanese entity by a U.S. POW seeking compensation for mistreatment or failure to pay wages for labor performed in Japan while a POW during World War II, to allow them to apply the statute of limitations of the State where the action is pending. It also requires the courts to not interpret the Treaty of Peace with Japan as waiving these claims by U.S. POWs. The bill states that the U.S. policy is that any war claim settlement terms between Japan and any other country, and any other country more beneficial in terms extended to the U.S. under the treaty are extended to any claims covered by this bill.

Finally the bill authorizes the Secretary of Veterans Affairs to secure information on chemical or biological tests conducted by Japan on U.S. POWs during World War II. The bill directs that the information will be made available to the affect individual to the extent otherwise provided by law.

Opponents of this legislation argue that one, the revival of World War II claims waived against Japanese nationals in the treaty violates the spirit of U.S. treaty obligations, and number two, imposing Congress's interpretation of the treaty on U.S. courts raises constitutional questions regarding separation of powers because it usurps the constitutional prerogatives of the Judicial and Executive Branches to interpret the meaning of treaties by requiring the Executive Branch to share certain information, the bill threatens the President's constitutional authority to protect national security information, including diplomatic communications. And number four, the opponents continue, that reviving these claims will damage U.S./Japan relations and Japan would have the right to complain to the International Court of Justice. Courts have held that the claims brought against Japanese entities by POWs are expressly precluded by the 1951 treaty because the claims arose out of actions taken by Japan or its nationals in the course of prosecution of the war.

Proponents believe H.R. 1198 is necessary to allow the POWs to pursue justice for the horrible conditions and treatment that we all acknowledge they received at the hands of private entities in Japan.

Today we will review the arguments on both sides. We will be hearing testimony from the Department of State, the Department of Justice, Congressman Rohrabacher, the sponsor of the bill, and Mr. Lester Tenney, a former World War II POW.

Does the lady from California have an opening statement?

Ms. LOFGREN. Thank you, Mr. Chairman. I do, and I'll ask unanimous consent to include the entire statement in the record.

Mr. GEKAS. Without objection.

Ms. LOFGREN. But I would like to note, thank you first for this hearing. I think this is an important measure, and I would like to note not only Mr. Rohrabacher's support, but my colleague and

neighbor from San Jose, Mike Honda, who's been a tireless fighter for this cause, and I certainly commend his efforts and his working with Dana Rohrabacher so we could get to this point.

I look forward to hearing the witnesses, because in all honesty, I find it hard to understand the opposition to this bill when you take a look at the historical record and our—the veterans who deserve justice finally, just as victims of abuse from other parts of world from the same era have received some justice.

So I have questions, but in the interest of time, I would just like to thank you once again, Mr. Chairman, for the hearing and commend Congressmen Honda and Rohrabacher for their efforts that got us here, and look forward to the testimony.

Mr. GEKAS. Let the record indicate that the lady from Texas, Ms. Sheila Jackson is present, and we accord her the right to offer an opening statement.

Ms. JACKSON LEE. Let me thank my colleagues for their presence here on this very important legislative initiative, and to thank the Committee for holding this hearing because I believe that the role of Congress is to be catalytic and problem solvers, and therefore, when there is an issue that we can bring resolution to, it is important to use a legislative process, of which I believe Mr. Rohrabacher and Mr. Honda are attempting to do.

I note that we will hear from Dr. Tenney. I'm delighted of his presence, but I think before he even speaks, we need to be aware of the enormous unchallenged experience that he had during World War II, and the importance, if you will, of his words on why this legislation should move forward and why there should be a resolution. And that is, of course, if we look at the incidences that we have reviewed over the years, the family members that were tragically impacted by the attack on the embassies in Africa, and who were not fully compensated, and we have given a private bill for them; those who were impacted negatively by an incident with the Blackhawk and we had a private bill in that instance.

So I believe that Congress should be a problem solver and that private bills to deal with these particular extraordinary circumstances should be addressed, and certainly United States prisoners of war should be allowed their day in court.

And for that reason, Mr. Chairman, I want to listen to the witnesses, and I'd ask unanimous consent to allow my entire opening statement to be submitted into the record.

Mr. GEKAS. We thank the lady and we are prepared to hear the testimony of the witnesses, who are at first and foremost, the Honorable Dana Rohrabacher, who has served Congress with distinction from his district in California and has been active in a variety of issues over the years in which his name and the Congressional Record appears boldly on advocacy of many interesting and vital issues, and with whom I've had a collegial relationship on similar types of legislation, and he has earned the respect over the years of his colleagues. He will be the first witness.

The second witness will be William H. Taft, IV, who is of the Department of State. He is the principal adviser on all domestic and international legal matters to that Department and to the Foreign Service and Diplomatic and Consular posts abroad, as well as the principal adviser on legal matters relating to the conduct of foreign

relations to other agencies, and through the Secretary of State to the President and to the National Security Council.

He is joined at the counsel table—at the witness table by Robert McCallum, who was appointed by President George Bush to serve as the Assistant Attorney General of the Civil Division at the Department of Justice in 2001. With over 700 attorneys the Civil Division is the largest legal division in the Department. As Assistant Attorney General, Robert oversees litigation involving, for example, the defense of challenges to presidential actions and acts of Congress, national security issues, benefit programs, commercial issues, including health care fraud, banking, insurance, patents, debt collection, and the Food, Drug and Cosmetic Act.

And with us at the witness table is the esteemed former prisoner of war, Dr. Lester I. Tenney, and his history of service to the country, as epitomized by his continued effort in this particular regard, earns him the affection of his fellow citizens.

So we will begin the testimony by asking each witness to try to limit the time to about 5 minutes on the oral review of the written testimony, which will become a part of the record automatically and without objection.

And so we begin by allotting 5 minutes, which I know he will honor, to the gentleman from California.

**STATEMENT OF HONORABLE DANA ROHRABACHER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA**

Mr. ROHRABACHER. Thank you very much, Mr. Chairman. I appreciate your leadership in bringing this issue to the Congress. It deserves the attention that you're giving it, and we thank you for your leadership in doing so.

Congressman Mike Honda and myself, we've put a lot of time and energy into this. This is a bipartisan, totally bipartisan issue, and Mike and I believe in this, and I'm sure that most of our Members in Congress believe in it on both sides of the aisle.

In March of 2001 Mike Honda and I introduced a bill to address an extraordinary injustice that our own Government has for a half century imposed on some of America's greatest war heroes. The survivors of the Bataan Death March, who were later taken to Japan and Manchuria, were forced to serve as slave laborers for private Japanese companies. These American veterans have been denied the right to sue their tormentors. By the way, the guilty parties are now some of the world's top corporations. Mitsui Mining, Hitachi Shipbuilding, Kawasaki Heavy Metals Industry, Mitsubishi Heavy Metals Industries or Heavy Industries.

H.R. 1198, which now has 229 bipartisan cosponsors, would permit our heroic veterans to pursue their claims in State or Federal Courts for an apology and for compensation from these private Japanese corporations for mistreatment or failure to pay wages in connection with the slave labor that our veterans were illegally forced to perform.

After the war appropriately 16,000 Bataan survivors returned, all battered, nearly starved, many permanently disabled, and all of them changed forever. More than 11,000 POWs had died at the hands of their Japanese tormentors, some of these corporate tor-

mentors. These deaths are included among the worst records of physical abuse of POWs in recorded history.

Unfortunately, successive U.S. administrations have denied our former prisoners of war, these American heroes, their right to seek legal action against these Japanese companies that abused them, claiming the need to preserve the terms of the armistice that ended World War II. However, recognizing the rights of these American heroes to compensation for what they had been through in the service that they provided, illegally were forced to provide, would not violate the treaty between United States and Japan which ended the war. I repeat: what we are advocating is consistent with our treaty with Japan. In the Treaty of Peace with Japan signed at San Francisco in 1951 Japan admitted liability for its illegal and inhumane conduct toward allied prisoners, in particular, liability for such conduct toward members of the armed forces of allied—the allied powers held as prisoners of war.

Despite this admission of liability, article 14(b) of the treaty has been construed, again, been construed by different Administrations to waive all claims of nationals of the United States including claims of members of the United States Armed Forces held as prisoners of war by Japan during the second World War.

Yet several law professors have testified that this is not an accurate reading of article 14(b). That includes Professor John Rogers, who is a current nominee of this Administration to the Sixth Circuit Court of Appeals. In addition, under article 26 of the Treaty, the Government of Japan agreed that if entered into a war claims settlement agreement with—if it did, entered into a war claims settlement agreement with any other country that provided terms more beneficial than those terms extended to the parties of that particular treaty, then those favorable terms would automatically be extended to the parties, each of the parties of the Treaty, including the United States.

Since implementing the Treaty in 1952, the Government of Japan has entered into war claim settlement agreements with other countries such as the Netherlands, Korea and China, permitting those nationals to sue Japanese nationals, allowing such claims to be pursued without limitation, restriction or waiver of any type.

The hypocrisy of Japan's position toward American veterans, by the way, just last week, was exposed when the Japanese offered to pay billions of dollars in aid and indirect reparations to North Korea, which is a totalitarian country and a country that's admitted to kidnapping the citizens of Japan and causing the private death in that kidnapping of those Japanese citizens. They're going to honor those claims, yet the claims of U.S. veterans who survived the atrocities committed by private Japanese firms would only amount to a fraction of what now Japan is suggesting that they're going to give to North Korea. That is a slap in our face and a slap in the face of our American veterans.

In accordance with article 26 of the Treaty, Japan is obliged to extend the same more beneficial terms to our citizens and our veterans than it has to those other governments and the citizens of those other countries.

The most repugnant of this struggle by the survivors of the Bataan Death March for justice is that it is our own bureaucracy, the bureaucracy of our Government, not the Japanese, which is their greatest obstacle to finding justice. Our State Department has opted for the most restrictive reading of the Peace Treaty between the United States and Japan rather than trying to find a way of supporting our POWs. I thought our Government was supposed to work for our people. Certainly those other governments are working to try to find something to help their citizens out. No, I guess our lawyers are taught something different in law school in America.

Other countries have governments that are more committed to fight for the rights of their own people. Citizens of 11 countries, including China, Holland, the Philippines, Vietnam, the former Soviet Union and Korea, have all received reparation payments from Japan or Japanese companies in compensation for slave labor terms that were far more favorable than those given to American veterans. Our Government, to the contrary, again has taken a restrictive approach, and as a result our veterans, our greatest heroes, have been abandoned on the legal battlefield. The Bataan Death March survivors have been abandoned again and what a shame it is.

In fact of this obstructionism by our State Department in the final days of the last session of Congress, we passed Resolution S. Con. Resolution 158, calling on the Department to put forth—and I quote—“put forth its best efforts to facilitate discussions designed to resolve all issues between former members of the Armed Forces of the United States, who were prisoners of war and forced into slave labor for the benefit of Japanese corporations during World War II and the private Japanese companies who profited from that slave labor.”

This was an invitation to seek an out-of-court settlement. To date the State Department, unless they have something to tell us today, has apparently taken no action. I'd like to know what action they've taken to try to solve this with those Japanese companies behind the scenes.

It is therefore up to Congress to press this issue firmly and fairly. More than half the Members of the House of Representatives have cosponsored H.R. 1198 because they believe it is balanced and fair and a response to a grave injustice, that these same Japanese companies that have abused American heroes are now household names in the United States. As an ethical or moral matter, they long ago should have voluntarily reached out to their victims and settled this injustice. Our veterans deserve their day in court, and that's what this legislation does.

I urge my colleagues to pass H.R. 1198 before the end of this session, and I appreciate, Mr. Chairman, all the Members of this Subcommittee for what you're going to do, and hopefully the backing you'll give to America's greatest war heroes who stand with their hand out, and we should not, again, abandon them in their struggle.

Thank you very much.

[The prepared statement of Mr. Rohrabacher follows:]

PREPARED STATEMENT OF THE HONORABLE DANA ROHRBACHER, A REPRESENTATIVE  
IN CONGRESS FROM THE STATE OF CALIFORNIA

In March, 2001, my colleague, Mike Honda and I introduced a bill to address an extraordinary injustice that our own government has, for a half-century, imposed on some of America's greatest heroes. Survivors of the Bataan Death March who were later taken to Japan and Manchuria were forced to serve as slave laborers for private Japanese companies. These American veterans have been denied the right to sue the companies of their torturers, who have become some of the world's top corporations.

H.R. 1198, which now has 230 bi-partisan co-sponsors, would permit these veterans to take actions in U.S. Federal courts to seek compensation from the private Japanese companies—currently some of the largest corporations in the world—for mistreatment or failure to pay wages in connection with the slave labor that they were forced to perform.

After the War, approximately 16,000 Bataan survivors returned—all battered and nearly starved, many permanently disabled, all changed forever. More than 11,000 POWs had died at the hands of their Japanese corporate employers. These deaths are included among the worst records of physical abuse of POWs in recorded history.

Unfortunately, successive U.S. Administrations have denied these former-prisoners the right to seek legal actions against the Japanese companies that abused them, claiming the need to preserve the terms of the Armistice that ended World War II. However, recognizing the rights of these American heroes to sue for compensation would not violate the treaty between the United States and Japan which ended of the war. I repeat, what we are advocating is consistent with our treaty with Japan. Consider the following facts:

In the Treaty of Peace with Japan, signed at San Francisco in 1951, Japan admitted liability for its illegal and inhumane conduct toward the Allied Powers and, in particular, liability for such conduct toward members of the armed forces of the Allied Powers held as prisoners of war.

Despite this admission of liability, article 14(b) of the Treaty has been construed to waive all claims of nationals of the United States, including claims of members of the United States Armed Forces held as prisoners of war by Japan during World War II.

However, Under Article 26 of the Treaty, the Government of Japan agreed that, if it entered into a war claims settlement agreement with any other country that provided terms more beneficial than those terms extended to the other parties of the Treaty, then those more favorable terms would be extended to each of the parties of the Treaty, including the United States.

Since implementing the Treaty in 1952, the Government of Japan has entered into war claims settlement agreements with other countries that permits nationals of those countries to sue Japanese nationals, allowing such claims to be pursued without limitation, restriction, or waiver of any type.

In accordance with article 26 of the Treaty, Japan is obligated to extend the same more beneficial terms to citizens who were forced to provide labor without compensation and under inhumane conditions.

The most repugnant aspect of this struggle by the survivors of the Bataan Death March for justice is the bureaucracy of our own government—not the Japanese—who are the greatest obstacle to overcome. Our State Department has stood in the way of our POWs' efforts to obtain some amount of justice by their restrictive reading of the peace treaty between the U.S. and Japan.

Other countries have governments that are more committed to fight for the rights of their own people. Citizens of eleven countries, including China, the Holland, the Philippines, Vietnam, the former Soviet Union and Korea have all received reparations or payments from Japan or Japanese companies in compensation for their slave labor in terms far more favorable than American veterans. Our government, to the contrary, has taken a restrictive approach and, as a result, veterans have been abandoned on the legal battlefield.

In the face of this obstructionism by the State Department, in the final days of the last session, Congress passed a resolution, S. Con. Res. 158, calling upon the Department to "put forth its best efforts to facilitate discussions designed to resolve all issues between former members of the Armed Forces of the United States who were prisoners of war forced into slave labor for the benefit of Japanese companies during World War II and the private Japanese companies who profited from their slave labor." To date, the State Department has apparently taken no action. It is therefore up to this Congress to press this issue firmly but fairly.

In May 2000, a Japanese court ordered the Mitsui Mining Company to pay \$85,000 to each Chinese citizen used as forced labor during World War II. This follows an agreement in 2000, when the Kajima Corporation agreed to set up a trust fund to compensate Chinese forced-laborers. The Communist Chinese government is pursuing justice for its citizens. However, the United States Government has refused to support similar claims by survivors of Corrigedor and the Bataan Death March—who were subsequently brutalized as slaves by Japanese companies.

Our legislation is a balanced and fair response to this situation. If enacted, it would pursue justice through the U.S. court system (as any former employee of a private employer can), and allows states to extend the statute of limitations applicable to these claims for a period up to 10 years. Since the end of the World War II, the Japanese corporations that abused these former POWs and profited from their forced labor have prospered enormously. Many of these companies are now household names in the United States. As an ethical and moral matter, they long ago should have voluntarily reached out to their victims and settled this injustice.

Unfortunately, to date the U.S. State Department has asserted that former POWs can claim no benefits. Our State Department has stood in the way of our POWs' efforts to obtain some amount of justice by their restrictive reading of the peace treaty between the U.S. and Japan. It is therefore up to this Congress to press this issue firmly but fairly.

The hypocrisy of Japan's position was exposed last week, when the Japanese Government offered to pay billions of dollars in aid and indirect war reparations to North Korea, a totalitarian country that admitted to kidnaping and causing the deaths of private Japanese citizens. Claims by U.S. veterans who survived atrocities committed by private Japanese firms would amount to a mere fraction of what Japan intends to give away to dangerous North Korea.

More than half the Members of the House of Representatives has co-sponsored H.R. 1198 because they believe it is a balanced and fair response to this grave injustice. Many of these same Japanese companies that abused our American heroes are now household names in the United States. As an ethical and moral matter, they long ago should have voluntarily reached out to their victims and settled this injustice. Our veterans deserve their day in court. I urge my colleagues to support H.R. 1198.

Mr. Chairman, with your permission, I would like to include the written legal statements on the 1951 Peace Treaty by two distinguished professors of law: Michael D. Ramsey of the University of San Diego Law School, and Harold G. Maier of Vanderbilt University, as part of the record of this hearing.

Mr. GEKAS. We thank the gentleman for his statement. Let the record indicate that Congressman Flake is present and accounted for, a Member of the Committee, as is Congressman Forbes.

We will proceed with the next witness. We turn to Mr. Taft.

#### **STATEMENT OF WILLIAM H. TAFT, IV, LEGAL ADVISER TO THE SECRETARY OF STATE, DEPARTMENT OF STATE**

Mr. TAFT. Thank you, Mr. Chairman.

I'd like to open first by saluting Dr. Tenney for his service to our country. Mr. Chairman, Members of the Committee, I appreciate the opportunity to testify today on the Department of State's views on H.R. 1198, The Justice for United States Prisoners of War Act.

In short, the Department supports justice for U.S. prisoners of war, but it does not support H.R. 1198. By justice for U.S. prisoners of war we mean that the United States should assure that our POWs, together with all of our veterans, receive full and fair compensation for their service. Special hardships connected with that service should be considered in determining what compensation is proper. We owe it to those who serve to establish an equitable system that takes into account the many different situations that they experience. It is an obligation the United States has to all its servicemen. It should not depend for its fulfillment on whether some corporation is responsible for a particular injury or

is liable to suit or has the ability to pay or just decides to be generous.

In the aftermath of World War II the Government had to determine how to compensate those who had served in that conflict. There was special concern for those who had been POWs in the Pacific Theater and special provision was made for them. The Peace Treaty with Japan was negotiated against this background. It provided, among other things, that certain assets of the Japanese Government and Japanese nationals would be used to compensate U.S. citizens and servicemen for claims against Japan. The U.S. used some of these assets to make payments to POWs specifically and some for other purposes. The Treaty expressly waived all claims of U.S. nationals arising out of any actions taken by Japan—and I'm quoting—"arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." This waiver applies to claims by POWs as well as others.

In approving the Treaty the Senate considered the claims it was waiving and the money available to satisfy them in the War Claims Fund. In addition to Japanese assets confiscated by the U.S. there was a chance that assets confiscated by other allied governments would be available. Beyond that, however, the Senate was informed, in response to its inquiry, that, and I quote: "The U.S. nationals must look for relief to the Congress of the United States." The Foreign Relations Committee advised the Senate accordingly in reporting the treaty, nothing that it was, and I quote again: "The duty and responsibility of each government to provide compensation for persons under its protection as that government deems fair and equitable. Such compensation to be paid out of reparations that may be received from Japan or from other sources."

So the Treaty waived the claims against Japanese nationals that H.R. 1198 seeks to revive. Moreover, in approving the Treaty, the United States understood that any additional compensation for POWs or other U.S. claimants was its own responsibility. Former Secretary Shultz, in the letter he wrote last year to the Chairman of this Committee, expressed the same view. "Where we have veterans," he said, "especially veterans of combat who are not being adequately supported, we must step up to their problems without hesitation."

"But," Secretary Shultz continued, "let us not unravel confidence in the commitment of the United States to a treaty properly negotiated and solemnly ratified."

Because that is what H.R. 1198 would do, we cannot support it.

I would like to mention briefly three reasons why we oppose its enactment. First, H.R. 1198's revival of World War II claims against Japanese nationals that were waived in the 1951 Peace Treaty would be inconsistent with our treaty commitments and undermine international confidence in the United States' commitments and its word. Second, walking away from our commitments under the 1951 Peace Treaty would have adverse foreign policy consequences. The Treaty has for 50 years been the cornerstone of U.S. security policy in the Pacific region. Abandoning it now could have serious repercussions. Third, H.R. 1198 raises constitutional concerns, and my colleague, Mr. McCallum, will go into those.

In conclusion, the Administration is of the view that H.R. 1198 is the wrong way to go. If additional assistance is due to our World War II POWs from the Pacific Theater or any other group of veterans for that matter, Congress should appropriate funds for that purpose. That would be the right thing to do. Nothing in the Japanese Peace Treaty prevents it. A great nation does not repudiate its treaties. It does take care of its prisoners of war.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Taft follows:]

PREPARED STATEMENT OF WILLIAM HOWARD TAFT, IV

Mr. Chairman and Members of the Committee:

I very much appreciate the opportunity to appear before you to provide the Department of State's views on H.R. 1198, "The Justice for United States Prisoners of War Act".

In short, the Department supports justice for U.S. prisoners of war, but it does not support H.R. 1198 and would oppose its enactment.

By "justice for U.S. prisoners of war," we mean that the United States should assure that our POWs, together with all our veterans, should receive full and fair compensation for their service. Special hardships connected with that service, such as those suffered by POWs, should be considered in determining what compensation is proper. Obviously, no amount of money can fully compensate those who, as POWs, have survived years of ill treatment in unspeakable conditions; those who have become permanently disabled in the service of our country; or, much more, those who have given their lives in that service. Nonetheless, we owe it to those who serve to do our best to establish an equitable system that takes into account the many different situations they experience. It is an obligation the United States has to its servicemen—all of them. It should not depend for its fulfillment on such unpredictable and variable factors as whether some person or corporation responsible for a particular injury is liable to suit, has the ability to pay, or decides as a matter of discretion to be generous.

In the aftermath of World War II, the government had to determine how to compensate those who had served in that conflict. There was naturally special concern for those who had been POWs in the Pacific Theater, and special provision was made for their compensation. This was done with full consideration of the circumstances of others who had served. A War Claims Fund was established to finance this effort. [See, e.g., *Hearings before the Committee on Foreign Relations of the United States Senate on Japanese Peace Treaty and Other Treaties Relating to Security in the Pacific*, pp. 145–147 (January 21–23, and 24, 1952); War Claims Act of 1948, as amended, 50 U.S.C. App. § 2001, et seq.; 1951 Peace Treaty, Article 16, 3 U.S.T. 3185.]

The Peace Treaty with Japan was negotiated, signed and ratified against this background. It provided, among other things, that certain assets of the Japanese Government and Japanese nationals would be confiscated and used to compensate U.S. citizens and servicemen for claims against Japan. [Treaty, Article 14.] The U.S. used some of these assets to make payments to POWs specifically and some for other purposes. [War Claims Act of 1948, as amended, supra.] The Treaty expressly waived all claims of U.S. nationals "arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war . . ." [Treaty, Article 14(b).] This waiver applies to claims by POWs as well as others.

In giving its advice and consent to the Treaty, the Senate considered the extent of the claims it was waiving and the money available to satisfy them in the War Claims Fund. In addition to Japanese assets confiscated by the U.S., there was a chance that assets confiscated by other Allied governments would be available. Beyond that, however, the Senate was informed in response to its inquiry that, "U.S. nationals . . . must look for relief to the Congress of the United States." The Senate Foreign Relations Committee advised the Senate accordingly in reporting the Treaty, noting that it was "the duty and responsibility of each [Allied] government to provide compensation for persons under its protection as that government deems fair and equitable, such compensation to be paid out of reparations that may be received from Japan or from other sources." [Hearings, supra, at 147; emphasis added.]

So, the Treaty waived the claims against Japanese nationals that H.R. 1198 seeks to revive. Moreover, in approving the Treaty the United States clearly understood that any additional compensation for POWs or other U.S. claimants was its own re-

sponsibility. Former Secretary Shultz, in the letter he wrote in June last year to the Chairman and Members of this Committee, expressed the same view: "Where we have veterans," he said, "especially veterans of combat who are not being adequately supported, we must step up to their problems without hesitation." I am sure all Americans would agree.

"But," Secretary Shultz continued, "let us not unravel confidence in the commitment of the United States to a treaty properly negotiated and solemnly ratified with the advice and consent of the U.S. Senate." Because that is what H.R. 1198 would do, we cannot support it.

I would like to mention briefly three reasons why the Administration opposes its enactment.

First, H.R. 1198's revival of World War II claims against Japanese nationals that were waived in the 1951 Peace Treaty would be inconsistent with our Treaty commitments, as clearly understood by our negotiators and by the United States Senate when it gave its overwhelming advice and consent to ratification.

Second, walking away from our commitments under the 1951 Peace Treaty would have adverse foreign policy consequences. The Treaty has for 50 years been the cornerstone of U.S. security policy in the Pacific region. Abandoning it now could have serious repercussions for our defense relationship with Japan and other countries in the region, apart from generally damaging U.S.-Japan relations.

Third, H.R. 1198 raises constitutional concerns. The bill raises separation of powers concerns, since Congress would assume the constitutional prerogative of the Judicial and Executive branches to determine what treaties of the United States mean. This problem is evident in the bill's central provision—its mandate of a specific judicial construction of Article 14(b) of the Treaty, one that is inconsistent with prior Judicial and Executive branch constructions of the provision. Many of the findings recited in section 2 of the bill are likewise inconsistent with the conclusions reached by the Judicial and Executive branches.

In conclusion, the Administration is of the view that H.R. 1198 is—on both legal and policy grounds—the wrong way for the United States to go. If we determine that additional assistance is necessary to the well-being of our World War II POWs from the Pacific Theatre—or any other group of veterans, for that matter—the way to provide such relief consistent with the Treaty would be for the Congress to appropriate funds for that purpose.

Thank you very much for your attention. I will be pleased to answer any questions that the Members may have.

Mr. GEKAS. We thank the gentleman. Let the record indicate that the gentlemen from Utah, Mr. Cannon, is present and accounted for, as is the gentleman from Massachusetts, Mr. Frank, a Member of the Committee.

We will proceed to the next witness, Mr. McCallum.

**STATEMENT OF ROBERT D. McCALLUM, JR., ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE**

Mr. McCALLUM. Mr. Chairman, like Mr. Taft, I am honored to appear before this Committee and to sit next to Dr. Tenney. I appreciate the opportunity to appear because this H.R. 1198 concerns certain lawsuits brought by former members of the United States Armed Forces, who were held by Japan as prisoners of war during World War II.

Before addressing the legal issues that are involved in this particular bill, I'd like to take a moment to recognize the deep debt of gratitude that our country owes to all those Americans who fought so valiantly for the cause of freedom during the Second World War. In one of our Nation's, indeed in one of the world's darkest hours, the generation of Americans answered the call, and they served in a heroic fashion. Their defense of all of us and all of the things that we hold dear came at a great personal cost to many, including Dr. Tenney, those whose lives were cut short, those who were wounded, those who endured brutal conditions. The

historical record is clear that many members of our armed services suffered unspeakable hardships as prisoners of war in Japan. And the facts alleged in the POWs' complaints and suits that have been filed against private Japanese companies tell heart-wrenching stories of starvation, beatings and forced labor. It's impossible to read those complaints without an overwhelming sense of both sympathy for their ordeal and awe at the strength and courage that enabled them to survive it.

It has, for these reasons, been with deep regret that I and others in the Department of Justice have filed briefs urging that the courts dismiss these POW lawsuits against the companies that are accused of treating our veterans so inhumanely. We have done so because it is our legal obligation, our responsibility, to interpret and apply the law in an objective and consistent manner regardless of our personal sympathies for the claimants or our personal preferences as to the outcome of any particular suit. Based upon the clear and unambiguous language of the Treaty, based upon its extensive legislative history, and based upon explicitly expressed foreign policy interests, we have reached the firm conclusion that such filings are the only consistent course with our international obligations solemnly entered into by the United States more than a half century ago. We have likewise opposed State legislation that purports to provide World War II forced laborers with a cause of action, not because those statutory beneficiaries are unworthy, but because such intrusion by the States into the realm of foreign affairs violates the fundamental principles of our Constitution, which relates foreign relations exclusively to be conducted by the Federal Government alone.

Now, we have approached H.R. 1198 in a similar fashion, and the question that we address is not whether these American heroes deserve the gratitude of our Nation and deserve additional benefits enacted by the Congress, but whether this particular bill, H.R. 1198, makes good law. And we state to you that it does not.

The Department of Justice opposes H.R. 1198 because it is completely irreconcilable with our international obligations under the Treaty of Peace by which World War II was concluded. We oppose it because it threatens important separation of powers principles, invading the Executive role in conducting foreign affairs and the Judiciary's role as arbiter of legal disputes, and we oppose it because it undermines established principles of federalism by ceding to the various States a role in matters of fundamentally national concern.

We submit to you that Congress should not, out of an entirely understandable and well intentioned desire to honor the sacrifices of our military personnel, who suffered as prisoners of war, enact legislation that undermines our national—our Nation's credibility in its dealings with foreign nations and upsets the constitutional designs by which our framers intended to ensure that in matters of foreign affairs, the Nation speaks with one single voice.

The chief operating provision of H.R. 1198 directs Federal Judges to construe article 14(b) of the Treaty as not waiving claims of American prisoners of war against Japanese corporations. This provision cannot be reconciled with the language and intention of the Treaty.

At the conclusion of the Second World War, the United States condemned, in the strongest possible terms, the Japanese Government's treatment of American prisoners of war, and the Japanese Government recognized its obligations to pay reparations for damages and suffering caused by it. Under the Treaty Japanese nationals and the Nation of Japan, waived all claims against the allies and their nationals and gave the allies the right to seize certain assets and dispose of them. In return, in article 14 of the Treaty, the allied nations expressly waived, on behalf of themselves and their nationals, claims arising out of actions taken by Japan and its nationals in the course of the prosecution of the war. This waiver included the claims of the United States and the allied prisoners of war.

Each allied government assumed the responsibility for using the seized Japanese assets and any other assets that it appropriated to provide compensation to the nationals in a manner it deemed fair and equitable. In the United States those seized assets were placed into the War Claims Fund, established pursuant to the War Claims Act, and distributed through the War Claims Commission. Among those eligible for payments were Americans held as prisoners of war by Japan, who received payments based upon the conditions of their imprisonment, including whether they were forced to perform labor without pay in contravention of the Geneva Convention.

The decision of the United States and 45 other allied nations to enter into this Peace Treaty reflects a broad bipartisan consensus within the Executive and the Legislative Branches at that time. The national design was to sign and ratify the Peace Treaty, and it was based upon a strong desire to ensure that Japan would develop a democratic economically viable ally that would not fall under communist sway. The United States sought specifically to avoid the disastrous consequences of the punitive reparations provided in the Versailles Treaty that ended World War I.

In addition, section 3(a) of H.R. 1198 raises substantial separation of powers concerns. The bill purports to compel the courts to construe the Treaty in a manner advanced by Congress, and there is serious legal question as to whether Congress has the constitutional authority to insist through legislation that other branches adopt or advocate Congress's preferred construction. The legislation likewise infringes on the Executive's constitutional responsibility for treaty interpretation and enforcement. In sum, the proposed legislation provides separation of powers issues that are of the most serious kind.

It also purports to invoke article 26, the Most Favored Nation Clause of the Treaty of Peace, but this invocation is premised upon a misunderstanding of that article and a misappreciation of the advantages obtained by the United States in the 1951 Treaty. It does not, the bill itself, identify other treaties that are claimed to be more advantageous. All of the treaties of which the Department of Justice is aware, including those on which the litigants have placed reliance, preclude litigation of prisoner of war claims.

Many of the treaties upon which the litigants rely contain no waiver whatsoever of claims by Japan and Japanese nationals. Thus, none of the treaties provide the important reciprocal waiver of benefits obtained by the United States in article 19 of the 1951

Treaty. In the absence of this reciprocal waiver, that is claims of Japanese nationals that relate not only to the prosecution of war but also to the occupation of Japan after the surrender of Japan, makes those treaties less advantageous than the treaty in favor of the United States.

The bill further raises concerns regarding the Federal Government's constitutional responsibility and exclusive role in conducting the Nation's foreign affairs, a prerogative which the Justice Department has vigorously defended in this and many other cases. Such State involvement in foreign affairs contravenes the Constitution's grant to the Federal Government of exclusive authority to conduct the Nation's foreign relations, an area that the framers specifically determined should be left entirely free from State interference. It goes without saying that the hardships endured by American prisoners of war were suffered as Americans generally, not as Californians or Texans or Kansans. Whatever rights those prisoners of war may have, compensation should be determined in a consistent and uniform way according to Federal Law and not the vagaries of State legislation.

Mr. Chairman, all of us share a common concern for the well being of those who served America so well and so proudly and endured such hardships on our behalf, and that goal is not, however, properly pursued through H.R. 1198.

We, American people, the Congress, the Executive Branch, we must all address the needs of these veterans in a manner that is consistent with our binding treaty obligations and that does not raise serious constitutional questions.

Mr. GEKAS. Would the gentleman draw to a close?

Mr. MCCALLUM. I thank the Chairman for this opportunity to present the views of the Department to the Committee.

[The prepared statement of Mr. McCallum follows:]

PREPARED STATEMENT OF ROBERT D. MCCALLUM, JR.

Mr. Chairman and members of the Committee:

I appreciate the opportunity to appear before you to provide the Department of Justice's views on H.R. 1198, which concerns certain lawsuits brought by former members of the United States Armed Forces who were held by Japan as prisoners of war during World War II. Before addressing issues raised by this particular bill, I want first to take a moment to recognize the deep debt of gratitude that our country owes to all those Americans who fought so valiantly for the cause of freedom in the Second World War.

In one of this nation's, indeed the world's, darkest hours, that generation of Americans answered the call to service in heroic fashion. Their defense of all we hold dear came at a great personal cost to many—those whose lives were cut short, those who were wounded and those who endured brutal conditions at the hands of their captors. The historical record is clear that many members of our Armed Forces suffered unspeakable hardships as prisoners of Japan during the war. The facts alleged in the POWs' complaints tell heart-wrenching stories of starvation, beatings, and forced labor. It is impossible to read them without an overwhelming sense of both sympathy for their ordeal and awe at their strength to survive it.

It has, for these reasons, been with great regret that I and others at the Department of Justice have filed briefs urging that the courts dismiss these POWs' lawsuits against the companies that are accused of treating them so inhumanely. We have done so because it is our obligation to interpret and apply the law in an objective and consistent manner regardless of our personal sympathy for the claimants or personal preferences as to the outcome. Based upon clear and unambiguous language, extensive legislative history, and explicitly expressed foreign policy interests, we have reached the firm conclusion that such filings are the only course consistent with the international obligations solemnly entered into by the United States half

a century ago in the 1951 Treaty of Peace that formally concluded World War II with Japan. Likewise, we have opposed state legislation that purports to provide World War II forced laborers with a cause of action not because the statute's beneficiaries are unworthy, but because such intrusion by the states into the realm of foreign affairs violates the fundamental principle of our Constitution that foreign relations should be conducted by the Federal Government alone.

We approach H.R. 1198 in a similar fashion. The question we address is not whether these American heroes deserve the nation's attention, but whether this particular bill would make good law. It would not. The Department of Justice opposes H.R. 1198 because it is irreconcilable with our international obligations under the Treaty of Peace by which World War II was concluded. We oppose it because it threatens important separation of powers principles—invading the Executive's role in conducting foreign affairs and the courts' role as arbiter of legal disputes. We oppose it because it undermines established principles of federalism by ceding to the various states a decisive role in matters of fundamentally national concern.

Congress should not, out of an entirely understandable and well-intentioned desire to honor the sacrifices of our military personnel who suffered as prisoners of war, enact legislation that undermines our country's credibility in its dealings with foreign nations and upsets the constitutional design by which the Framers intended to ensure that, in matters of foreign affairs, the nation speaks with a single voice.

#### HISTORY OF THE 1951 TREATY OF PEACE WITH JAPAN

At the conclusion of the Second World War, the United States condemned, in the strongest possible terms, the Japanese Government's treatment of American prisoners of war. In the Treaty of Peace, the Japanese Government recognized its obligations to pay reparations for the damage and suffering caused by it during the war and did so by providing reparations to an extent unprecedented in modern times. Under the 1951 Treaty, Japan waived all claims against the Allies and their nationals and gave the Allies the right to seize and dispose of approximately \$4 billion in Japanese assets located within their territories—including the assets of Japanese corporations. In return, in Article 14 of the Treaty, the Allied nations expressly waived—on behalf of themselves and their nationals—claims arising out of actions taken by Japan and its nationals in the course of the prosecution of the war. This waiver included the claims of United States and Allied prisoners of war.

In waiving all such claims against Japan and its nationals, each Allied government assumed the responsibility for using the seized Japanese assets to provide compensation to its nationals in a manner it deemed fair and equitable. In the United States, the seized assets were placed into the War Claims Fund established pursuant to the War Claims Act, 50 U.S.C.App. §2001, *et seq.*, and distributed through the War Claims Commission. Among those eligible for payments from the War Claims Fund were Americans held as prisoners of war by Japan, who received payments based on the conditions of their imprisonment, including whether they were forced to perform labor without pay in contravention of the Geneva Convention.

The decision of the United States—together with 47 other Allied nations—to enter the 1951 Peace Treaty reflected a broad, bipartisan consensus within the Executive and Legislative Branches. The national decision to sign and ratify the Peace Treaty was based on a strong desire to ensure that Japan would develop into a democratic, economically viable ally that would not fall under Communist sway. The United States also sought to avoid the disastrous consequences of the punitive reparations provisions of the Versailles Treaty that ended World War I. For this reason, the Executive Branch in negotiating the Treaty, and the Senate in ratifying it, determined that all claims against Japan and its nationals should be waived in exchange for the similar waiver by Japan and its nationals of all claims against the United States and its nationals, and the extensive reparations paid by Japan and its nationals through the seizure of property in the United States and its territories.

Over the past five decades, the Treaty of Peace with Japan has served U.S. security interests in Asia by supporting peace and stability in the region. It is incumbent on the United States to honor its international agreements: Failure to do so would raise serious questions in the international community at a time when our relations with foreign nations are so critically important. There is, in our view, no basis for United States or Allied citizens to reopen the question of international commitments and obligations under the 1951 Treaty.

#### ARTICLE 14(B) OF THE 1951 TREATY OF PEACE WITH JAPAN

The chief operative provision of H.R. 1198, section 3(a)(2), directs federal judges to construe Article 14(b) as not waiving the claims of American prisoners of war

against the Japanese corporations for whom they were forced to perform labor during World War II. This provision cannot be reconciled with the language and intent of the Treaty.

The Treaty of Peace signed on September 8, 1951, between the United States, 47 other Allied powers and Japan formally concluded World War II with respect to the Pacific Theater. *See* 3 U.S.T. 3169. The Treaty reflects the United States Government's foreign policy determination that all war-related claims against Japan and its nationals—including private claims—should be resolved by government-to-government agreement rather than litigation.

John Foster Dulles, the United States' principal negotiator, believed that continued demands for war-claims compensation would prevent Japan's economic recovery and its development into a reliable democratic ally against communism. The Korean War had begun; communist forces had taken control of the Chinese mainland; and Soviet expansionism was a world-wide threat. Japan was at the center of these geopolitical forces. The United States viewed an economically stable, anti-communist Japan as essential to the United States' interests in the Pacific region. Japan could not play that role if it were subject to continuing war claims that might stifle its economy.

Nor did the United States and the Allies wish to repeat the experience of the Versailles Treaty and the reparations scheme following World War I, which many consider to be one of the root causes of World War II. Finally, the United States Government, having assumed sole responsibility for Japan's recovery during the occupation of Japan following the war, concluded that any substantial payment of war-related claims ultimately would come out of the pockets of the American taxpayers. For these reasons, the President, and Senate in its advice-and-consent role, determined that all claims against Japan and its nationals should be waived in exchange for the forfeiture by Japan and its nationals of their foreign assets, and a similar waiver of claims by Japan and its nationals against the Allies and their nationals.

The Allied nations that are parties to the Treaty, including the United States, expressly waived all claims that they or their nationals might have against Japan and its nationals arising out of the war. Article 14 of the Treaty covers reparations and other claims against Japan by the Allies "for the damage and suffering caused by it during the war." Art. 14(a).

Article 14 has three principal elements: (1) a grant of authority to the Allied governments "to seize \* \* \* all property, rights and interests of \* \* \* Japan and Japanese nationals" located in the Allies' respective jurisdictions; (2) a commitment by Japan to help rebuild the territory that had been occupied by Japanese forces; and (3) a waiver of claims by Allied governments and their nationals against Japan and Japanese nationals. Art. 14(a)-(b). As relevant here, the waiver provision states that:

the Allied Powers waive all \* \* \* claims of the Allied Powers \* \* \* and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war \* \* \*.

The historical record overwhelmingly indicates that Article 14(b) was intended to be a final settlement of all war-related claims. In the reciprocal waiver provision, Article 19(a) of the Treaty, Japan finally waived all claims of Japan and its nationals against the Allied Powers and their nationals arising out of the war and subsequent occupation, including, for example, claims against the United States, the manufacturers of the atomic bombs, and the individuals who ordered and performed the bombings of Japan.

In addition to obtaining a similarly broad waiver of claims by Japan and its nationals, the Allies and their nationals received significant compensation for the released claims. Under Article 16, Japan transferred its assets in neutral or enemy jurisdictions, worth approximately \$20 million, to the International Committee of the Red Cross for distribution to those who had been held as prisoners of war by Japan and to their families. Under Article 14, which authorized the Allied governments to seize the property of "Japan and Japanese nationals" located within their respective jurisdictions, the Allies confiscated approximately \$4 billion, including assets in U.S. territory worth, in 1952, over \$90 million. In the case of the United States, these assets were placed in a War Claims Fund, and used, as directed by Congress, to compensate Americans who had suffered at the hands of the Japanese during the war. Beneficiaries of the War Claims Fund included both American civilians held captive by Japan and American service members held as prisoners of war. Prisoners of war were eligible to receive compensation for inadequate food, prison conditions, and for violations of their rights under the Geneva Convention, including claims "relating to labor of prisoners of war." 50 U.S.C. App. § 2005(d).

Under the laws of war, including the Geneva Convention, the Government of Japan was responsible for the treatment of its prisoners of war, including the payment of wages to prisoners who labored for private entities. Therefore, there is no question that the claims of American prisoners of war for compensation for labor performed for Japanese corporations arise out of “the prosecution of the war” and are waived under Article 14(b). Indeed, as claims arising under the laws of war, they are at the core of that waiver. Claims for compensation to prisoners of war indisputably would be barred if asserted against the Japanese government. And, because the waiver of claims against Japanese nationals is coextensive with the waiver of claims as against Japan itself, such claims are equally barred when asserted against the Japanese corporations for which the prisoners of war were assigned to work. One federal court already has so held.

#### ARTICLE 26 OF THE 1951 TREATY OF PEACE WITH JAPAN

H.R. 1198 implicitly recognizes that the proposed legislation would alter existing Treaty obligations by invoking Article 26 of the Treaty of Peace. Article 26 provides that, “[s]hould Japan make a peace settlement or war claims settlement with any State granting that State greater advantages than those provided by the present Treaty, those same advantages shall be extended to the parties to the present Treaty.”

H.R. 1198 recites (Sec. 2(6)), that the “Government of Japan has entered into war claims settlement agreements with other countries that provide terms more beneficial \* \* \* with respect to claims by nationals of those countries against Japanese nationals, allowing such claims to be pursued without limitation, restriction, or waiver of any type.” This assertion is incorrect: no such treaties exist. Moreover, H.R. 1198’s invocation of Article 26 is premised on a misunderstanding of that Article and of the “advantages” obtained by the United States in the 1951 Treaty.

H.R. 1198 does not identify the other treaties that are claimed to be more advantageous than the 1951 Treaty of Peace. Plaintiffs who are currently litigating this issue have purported to identify such treaties. However, all the treaties of which the Department of Justice is aware, including those on which litigants have placed reliance, preclude litigation of prisoner of war claims. Treaties entered into by Burma and Indonesia contain precisely the same waiver language that appears in Article 14(b). Agreements with South Korea and the Soviet Union similarly settled national versus national claims arising out of the war. The treaty with Taiwan specifically provides for national versus national claims to be resolved by intergovernmental arrangements. The four other agreements that have been cited—with Denmark, Sweden, Spain and Switzerland—specifically encompass all claims “for which the government of Japan is held responsible under International law.” As previously noted, the Government of Japan is held responsible under international law for the treatment of those it held as prisoners of war, including the payment of wages to prisoners of war forced to perform labor for private entities. Thus, each and every one of the treaties cited by plaintiffs does resolve claims for prisoner of war forced labor.

Moreover, the invocation of Article 26 misunderstands the language of that provision. Article 26 may be invoked only if Japan enters into a “war claims settlement” that provides greater advantages than the Treaty of Peace. That provision would not be implicated if another agreement did not purport to settle the claims of nationals against nationals. The treaties with Denmark, Sweden, Spain and Switzerland contain no waiver of claims by Japan and Japanese nationals against those four governments or their nationals. This is not surprising since none of these countries was at war with Japan in World War II. Thus, none of those treaties provide the benefits obtained by the United States in Article 19. The absence of a reciprocal waiver of national versus national claims, therefore, would render these treaties less advantageous than the 1951 Treaty was for the United States.

#### CONCERNS RAISED BY H.R. 1198

First and foremost, the United States will do itself irretrievable damage if it alters, half a century after the fact, the binding terms of the Treaty that concluded World War II. Particularly at a time when the confidence of our allies is required for a variety of purposes, such an enactment should not be contemplated.

Enactment of the bill could also result in other direct adverse consequences. If Japan concludes that the United States has, in fact, abrogated the Treaty, it might bring suit against the United States in the International Court of Justice. Such a dispute would itself engender significant embarrassment and potential harm. Moreover, if it were held that the United States had, indeed, abrogated the Treaty, the consequences might include the nullification of Japan’s reciprocal waiver under Article 19(a), thereby allowing Japanese citizens to bring suit against the United States

and its citizens for actions during World War II, suits that might include claims by Japanese citizens concerning the United States' use of atomic bombs against Japan.

The proposed legislation would also give rise to a variety of serious constitutional concerns. H.R. 1198 purports to make findings of fact and law with respect to certain actions presently pending in federal court—including that the claims are “unrelated to the prosecution of the war” (Sec. 2(1)), and that the individual defendant corporations “violated international law \* \* \* by failing to pay wages for that labor, by allowing and promoting torture and mistreatment \* \* \*, and by withholding food and medical treatment.” (Section 2(2)). In addition, H.R. 1198 would compel the courts to construe Article 14(b) of the Treaty in the manner advanced by the plaintiffs. (Sec. 3(a)(2)).

While Congress may, by enactment of a law, abrogate the domestic legal effect of treaties, there is a serious legal question whether Congress has constitutional authority to insist, through legislation, that the other branches advocate or adopt Congress's preferred construction of them. Congress cannot unilaterally change the meaning of an agreement entered into with another sovereign nation and require the judiciary to accede to an interpretation irreconcilable with the language and history of the Treaty that it is being asked to construe. Moreover, the proposed legislation threatens to intrude on the courts' role as the finder of fact in litigation. The legislation likewise infringes on the Executive's constitutional responsibility for treaty interpretation and enforcement. As the Supreme Court repeatedly has acknowledged, the Executive Branch's interpretations of treaties must be accorded substantial deference. In sum, the proposed legislation raises separation of powers concerns of the most serious kind.

H.R. 1198 also raises serious concerns regarding the Federal Government's ability to maintain its exclusive role in conducting the nation's foreign affairs, a prerogative the Department of Justice has defended vigorously in the Japanese forced labor cases. In sections 2(9) and 3(a)(2), H.R. 1198 cedes to the various state legislatures a central role in creating causes of actions and/or extending the statute of limitations for claims arising out of World War II. Such state involvement in foreign affairs contravenes the Constitution's grant to the Federal Government of exclusive authority to conduct the nation's foreign relations, an area that the Framers specifically determined should be left entirely free from local interference. Indeed, the Supreme Court consistently has enforced the constitutional design by striking down state laws that would frustrate the objectives of established federal foreign policy and, even in the absence of federal action, setting aside state regulations that have more than an indirect effect on matters of foreign affairs.

The claims addressed by H.R. 1198 plainly touch on our foreign affairs and concern national, rather than local, interests. It goes without saying that the hardships endured by American prisoners of war in World War II were suffered as Americans, not as Californians or Kansans. Whatever rights those prisoners of war may have to compensation should be determined according to uniform federal law, not the vagaries of state legislation. Federal foreign policy in this area is that reflected in the 1951 Treaty of Peace and its negotiating history—that prisoners of war should be compensated in a fair and uniform manner out of assets seized from Japan and Japanese nationals and what further funds Congress may appropriate for that purpose. H.R. 1198, to the contrary, legitimates California's interference in these matters of foreign diplomacy and elevates state law regarding war claims above federal law as established in the Treaty.

Similarly, to the extent section 2(9) suggests that claims could be brought in the United States based directly on international law, H.R. 1198 would raise fundamental questions regarding the status of international law within federal law. International law provides a basis for bringing suit in the United States' courts only to the extent that it has been incorporated into the United States' domestic law. For example, there are many treaties to which the United States is a party that have been declared non-self-executing. H.R. 1198 might be construed, however, as allowing plaintiffs to bring claims based directly on international law documents, regardless of whether they have been incorporated into domestic law. This would be a dramatic shift in the law with potentially enormous consequences.

Finally, section 3(a)(2), by its terms, applies only to federal courts and not to state courts. This raises the prospect that the Treaty will be held to have one meaning in state court and another in federal court, thereby exacerbating the federalism problems identified above.

#### CONCLUSION

All of us share a common concern for the well-being of those who served America so well and endured such hardships on our behalf. That goal is not, however, properly pursued through legislation such as H.R. 1198. We must address the needs of American veterans in a manner that is consistent with our binding treaty obliga-

tions and that does not raise serious constitutional questions regarding the separation of powers among the coordinate branches of the national government and the Federal Government's exclusive role in conducting foreign affairs.

Mr. GEKAS. The Chair will exercise its prerogative of the gavel prior to hearing from our final and star witness in this matter, Dr. Tenney, to engage a markup, housekeeping business on the part of the Committee. With the indulgence of the witnesses, we declare a short recess for the purpose of convening a special session of this Committee to mark up two bills—three bills.

[Whereupon, at 3:16 p.m., the Subcommittee proceeded to other business.]

Mr. GEKAS. After completing the markups, to re-entertain the original hearing, we now turn to Mr. Tenney for his testimony.

Mr. FRANK. Mr. Chairman?

Mr. GEKAS. The gentleman from Massachusetts is recognized.

Mr. FRANK. Before Dr. Tenney speaks, I unfortunately have to leave for another commitment, but I just want to express my admiration for the work that our colleague, Mr. Honda, has done on this, and my support for his efforts, and I'll look forward to working with the sponsors, but I am afraid I have to go off to another meeting that had been scheduled.

Mr. GEKAS. The Chair thanks the gentleman.

Mr. Tenney, you may proceed.

**STATEMENT OF LESTER I. TENNEY, Ph.D.,  
FORMER PRISONER OF WAR**

Mr. TENNEY. Mr. Chairman, thank you, and Members of the Committee. I am honored to have been invited here today to share with the Committee my personal experiences and concerns regarding the issues at hand and to urge passage of H.R. 1198. I also would like to take a moment to thank Mr. McCallum for his kind remarks, referring to the Defenders of Bataan and Corregidor and other prisoners of war.

I also would like to just make one moment—comment, please, if I may, and that is it appears that in Mr. McCallum's testimony he failed to mention the Netherlands as one of the countries who made other treaties with Japan. He mentioned the other countries, but failed to mention them. I wonder is it because of the letter that was signed by the Japanese to the Netherlands, providing them with greater benefits.

Anyhow, I would like to share with you a few comments that I have prepared that will not take as much time as I originally planned, but I am one of the few survivors of the Bataan Death March that began in April, April 9th of 1942. The experience is a real one to me today as it was 60 years ago when I first endured the daily beatings and the torture and all the atrocities associated with the infamous starvation march across the Peninsula of Bataan.

I am here to speak not only of the brutality and suffering we endured, but the frustrations we have encountered ever since. Unfortunately, it wasn't enough, Mr. Chairman, that we, the fighting forces on Bataan, had defended against an overwhelming Japanese offensive for more than 4 months, actually 3 months longer than anyone would have predicted we could. As our supplies of food and

ammunition ran dry, it wasn't enough that promised provisions desperately needed to hold our ground never arrived. It wasn't enough also that the U.S. Government made a conscious and deliberate decision to sacrifice we young men and women, many still in their teens, who willingly gave everything they had for their country. Then, digging in, knowing that every day we could stall the Japanese offensive, our army could rebuild elsewhere, and Japan's planned invasion of Australia could be thwarted.

We were abandoned at Bataan. Our Government surrendered our troops in March of—they surrendered our troops before March 1942, but in March 1942, President Roosevelt, during his fireside chat, tried to explain this unfortunate event to the American public. He said that there are times during a war when a Government is forced to make a decision to sacrifice some of its warriors for the benefit of the overall war effort.

We were sacrificed, Mr. Chairman. We were sent to Bataan to do what our great Nation had asked us to do. We did it without question and with all the courage that we could muster. And as our food and ammunition ran out and our position was surrendered, we quickly came to realize that those who had perished in the fight were in some ways the fortunate ones.

Day after day on the march I watched in utter helplessness as hundreds of my friends, many who had become my brothers, were shot, bayoneted, decapitated, and in some cases, buried alive. I listened to their cries, their last requests, and the unspeakable sadness that comes to a man when he realizes he will never see his family again. I promised not to let the world forget their pain and suffering. I promised to make their passing easier, but that I couldn't do.

Mr. Chairman, no man can describe what we endured. Those strong enough to survive the Bataan March were sent to Japan on "Hell Ships" and I was one of them. Numb and barely alive, I took strength from my brave friends around me, and my family that I knew was praying for me at home, and from the love of my America, that I loved deeply and still love to this day.

Can you begin to feel how we felt? But still it wasn't enough. In Japan we were enslaved, not as prisoners of war, as international laws and military protocol dictate, but were enslaved, forced into mines that were collapsing and steel mills and loading docks too dangerous to work in. In my case, I was forced to work in a coal mine owned by the industrial giant, Mitsui. The Japanese and the Mitsui allowed me 500 calories of rice a day, and the medical care was practically non-existent. It was in the coal mine where I was beaten many times almost to the point of death. My back and shoulders were broken, my teeth knocked out, my nose and head split wide open, all of this done by civilians working for Mitsui, and these tragedies were done on a daily basis. Any time we didn't work fast enough, didn't work hard enough or if the Americans won a sea battle, we were beaten.

One of the real tortures was having to face our friends as they died. One, Andy Pavalockas, a very dear friend of mine, beaten, tortured, deprived of food for 30 days because he didn't work fast enough. And others too like Wally Cigoi and Bob Bronge, who

saved me on the Death March, and yet I couldn't save them when they were ready to die.

But it's not enough that they died, that we were never given an apology and no sorrow was ever shown, and these industrial giants that enslaved us went on to become multinational corporations of the 21st century. It's not enough that thousands of us labored and suffered and died, and that those corporations have attained unimaginable prosperity. For in addition to all this, our Government, the Government of the land we love, that we fought and died for, and that had abandoned us on Bataan, is now standing in the way of justice. It is our Government that is assisting these industrial giants who refuse to apologize or show remorse.

As soldiers, sailors and marines, we were able to deal with our Government's decision to abandon us on Bataan. We were sworn to defend our country at all cost. Death and imprisonment we knew was a part of war, and we faced this challenge with courage and honor, proud to do whatever we had to do. But as respectable and honorable human beings, we were never prepared for slavery, for the humiliation, inhumanity of being placed in the abusive servitude of private profit-making companies, companies that to this day have never publicly acknowledged what they did or asked for forgiveness for their atrocities. These corporations were unjustly enriched. They built empires on our labor, and they caused many of my friends to die.

Now their heinous crimes are compounded as they hide behind the rhetoric of some within our own Government, who incorrectly believed that a few lines written in an agreement long ago rob us, those who suffered as slave laborers, of our constitutional rights. This, Mr. Chairman, is wrong, and they cannot stand behind this misinterpretation of the facts. For all that is just and right about this great country of ours, it cannot be allowed to stand as said.

We, the defenders of Bataan and Corregidor were sacrificed once. We should not be sacrificed again. The first is understandable. The second would be unconscionable. Our rights as veterans are being denied us for the benefit of a few multibillion dollar private profit-making corporations who were responsible for enslaving us during World War II.

What's troubling to us today is that this is exactly what's happening, and it's opening wounds you will never be able to know. Our cause is about companies being responsible for their actions. It's about justice, justice denied us for such a long time. It's about the respect and human dignity that was taken from us many years ago. You see, Mitsui stole my honor. They robbed me of my dignity, and they tried to force me to lose faith in my country. Well, they thought they won. But they didn't, for I never lost faith in my country, nor my God.

Since the war ended, other POWs and I have tried to pursue claims against these companies because we know we were treated inhumanly, but at every turn our State Department has voluntarily come to the aid of these Japanese corporations. Even in 1946, when I sought information about my rights, I wrote a letter to the State Department dated September 11th of 1946, of which I have a copy with me, and I asked them what I could do to recover from the Japanese for the wrong. They responded on September 20th of 1946,

of which I have their response with me. I'd like to quote from it, please.

"With a view to rendering as much Government assistance as possible to former prisoners or their next of kin, and in order to obviate the necessity of their employing representatives or committees or associations to prepare their claims, representatives of the Department of State, War, Justice and Navy are currently engaged in devising procedures and in the preparation of official forms for the use of claimants who may desire to submit, for possible future consideration, claims against enemy countries."

The State Department's letter ended with the following sentence, and I quote, "Provision for the settlement of claims of labor performed by prisoners are for future legislative consideration."

For 56 years I have endeavored to obtain the meaning of this correspondence. I have not heard from them since. The best I can come up with is two important points. First, the State Department urged us not to retain the services of counsel or obtain advice from any military service organization. Second, our Government leaders, through legislative procedures, were going to assist us in our quest for justice. Written in 1946.

But here we are, almost six decades later, still waiting, waiting for the State Department to honor its commitment, hoping that we will not once again be abandoned by the Government we love and respect so very much. And Mr. Chairman, we have been waiting just as long for the Japanese companies to come forward to do the right thing.

Mr. TENNEY. I can assure you I never imagined in a million years that I would be here today testifying in front of this Committee those 60 years after I became a POW, but here I am. Despite our efforts to resolve our claims directly with these international companies, such as Mitsui, Mitsubishi, Nippon Steel, Kawasaki, and they've all refused.

So, finally, unable to wait any longer, in August 1999, I, along with other POWs, sought justice in the California courts. Time was running out, but once again we were disappointed. The State Department immediately began to inject themselves into our cases, while at the same time our ranks continued to die. In fact, since that day in August, only 3 years ago, we have lost almost 30 percent of our survivors of Bataan and Corregidor, with over 1,000 dying last year, and every day we lose more. In fact, each month that justice is denied us, another 50 survivors will die.

You know, if Congress doesn't assist us now, I fear none of us will live to see the justice that we deserve, and for the life of me I cannot understand why the State Department is so opposed to our seeking justice from the private companies that mistreated us during the war. I strongly emphasize our claims are not against the Japanese Government or the Japanese people, but against large, multinational conglomerates that are headquartered in Japan and doing business here in the United States and taking their funds with them.

I realize that the State Department takes the position that the 1951 treaty signed with Japan bars our claims, but I also know that several well-regarded international law professors, including Professor Rogers that you heard a few moments ago, including Mi-

chael D. Ramsey, professor of law from the University of San Diego Law school.

Professor Ramsey had this to say upon doing the research necessary, and I quote, "On the basis of the State Department's argument, I do not believe the treaty extinguishes the private claims of individual U.S. citizens against private Japanese companies."

If you check out the professor's research, you'll see that there are several reasons why the treaty does not bar our claim, including those of article 26. This provision, which is typically called the Most Favored Nation Clause, states that if Japan makes a better deal with any other country than they have made with us, then those provisions will automatically be provided to us or the signatories of the treaty.

At the Senate hearing, Professor Maier of Vanderbilt Law School, explained that citizens in at least eight countries have received greater benefits than we have. In this regard, please allow me to share with you some very disturbing information that just came to my attention, disturbing enough that I am sure you will see the hidden agenda in this action.

In June of the year 2000, a request was made under the Freedom of Information Act with the State Department requesting documents dealing with the issues of the Peace Treaty. This was done so that we would be better prepared to deal properly with our cause of action against those Japanese companies that enslaved so many.

The State Department had the audacity and the gall to petition the courts to give them until December 31st of the year 2003 to answer and comply with our request, 30 months they needed to comply with our request. Mr. Chairman, to be forced to wait 30 months is an injustice. It is an indication that the State Department has something to hide. It shows a total lack of concern for its citizens.

What they have done is a travesty of justice. I am concerned because the average age of we veterans is 84 years. We don't have much time left, and making us wait two and a half years for some documents is unconscionable, and demeaning, and shows the State Department's true colors. It appears to me that the actions of the State Department indicate that they are trying to redefine the meaning of justice and honor, which I think they have. It is especially troubling now that our leaders are, again, asking our Nation's young men and women to put their lives in harm's way, to be willing to risk all in the name of freedom.

Their request comes with the implied promise that for what they will give they will never be forgotten. Yet here before you today is a case where veterans of a war fought long ago have been forgotten, forsaken, and even insulted as certain members of their government assist the wealthy corporations that enslaved them years ago. What message is being sent to our young people, as they learn that the same leaders who are sending them to far-away lands are denying us the rights to pursue our claims? Is this the message we want our men and women in Afghanistan or possibly in Iraq to carry in the back of their minds?

Mr. Chairman, we can no longer afford to try to understand the motives of the Japanese companies or our State Department. With our ranks dying at such a rapid rate, we cannot wait. Today, we

ask you for support necessary to provide us with our long-sought Justice. We are asking you to let our courts decide what responsibility these multi-billion-dollar companies have for past crimes. Let the courts make the decision.

Back in 1951, members of the State Department wrote the text of the treaty. Now, 50 years later, different people in the State Department, in a new department, are trying to define what was written. I don't believe we should let the fox guard the henhouse. Let the courts make the decision.

Article 26 was, no doubt, included because the State Department realized that Japan, in their desire for more support from other countries, may have decided to provide greater benefits to these other countries, and article 26, when applied, would provide the U.S. the right to those same benefits.

This is all we ask, Mr. Chairman. It is all we want. We want nothing more than what is fair and just. It will heal open wounds and restore integrity to the greatest Government on earth, and it will reaffirm promises to those now serving. We believe firmly that responsibility and forgiveness goes hand-in-hand. If we are to forgive, then they have to have responsibility.

I am not looking for any sympathy, nor seeking any glory. All I really want is justice. We were very proud of the medals we were awarded while defending our country's freedom, but they have very little meaning if the Government of today denies us the right we fought for yesterday. We were there for our country when they needed us. Now we need our country to be there for us.

Mr. Chairman, Members of the Committee, I surrendered once. I will not surrender again.

Thank you.

[The prepared statement of Mr. Tenney follows:]

#### PREPARED STATEMENT OF LESTER I. TENNEY

Mr. Chairman and Members of the Committee:

I am honored to have been invited here today to share with the Committee my personal experiences and concerns regarding the issue at hand and to urge passage of H.R. 1198, the "Justice for U.S. POWs Act of 2001."

Thank you for this opportunity to tell you why we need Congress' assistance in resolving our claims against the Japanese companies that used us as slave laborers during World War II.

I am one of the few survivors of the Bataan Death March which began on April 9, 1942. The experience is as real to me today as it was sixty years ago, when I endured the daily beatings, the torture, and all the atrocities associated with that infamous starvation march across the peninsula. I am here to speak not only of the brutality and suffering we endured then, but the frustration we have encountered ever since.

Unfortunately, it wasn't enough, Mr. Chairman, that we, the fighting forces on Bataan, had defended against an overwhelming Japanese offensive for more than four months, three months longer than anyone had predicted we could, as our supplies ran dry. It wasn't enough that promised provisions, desperately needed to hold our ground, never arrived. It wasn't enough that the U.S. government made a conscious and deliberate decision to sacrifice our young men—many still in their teens—who were giving everything they had for their country, digging in, knowing that every day we could stall the Japanese offensive, our Army could rebuild elsewhere, and Japan's planned invasion of Australia could be thwarted.

We were abandoned at Bataan. Our troops were surrendered by our government. In March 1942, President Roosevelt, during his Fireside chat, tried to explain this unfortunate event to the American public. He said that there are times during war when a Government is forced to make a decision to sacrifice some of its warriors for the benefit of the over-all effort.

We were sacrificed, Mr. Chairman. We were sent to Bataan to do what our great Nation had asked us to do. We did it without question and with all the courage we could muster. And as our supplies ran out and our position was surrendered, we quickly came to realize that those who had perished in the fight were, in some ways, the fortunate ones.

Day after day, on that march, I watched in utter helplessness as hundreds of my friends—many who had become brothers—were shot, bayoneted, decapitated, and in some cases buried alive. I listened to their cries, their last requests, the unspeakable sadness that comes to a man when he realizes he will never again see his family. I promised not to let the world forget their pain and suffering, I promised to make their passing easier, but I couldn't.

Mr. Chairman, no man can describe what we endured. Those strong enough to survive The March were sent to Japan on "Hell Ships." I was one of them. Numb and barely alive, I took strength from the brave GIs around me, from my family that I knew was praying for me at home, and from my love for America—a love that remains undiminished throughout these many years.

Can you begin to feel how we felt? But still, it wasn't enough. In Japan, we were enslaved, not held as prisoners of war, as international laws and military protocol dictate. We were enslaved—forced into mines and steel mills and onto dangerous loading docks. In my case, I was forced to work in a coal mine owned by the industrial giant, Mitsui, who allotted me 500 calories of rice each day, and medical care was practically non-existent. It was in the coal mine where I was beaten, many times almost to the point of death. My back and shoulder were broken, my teeth knocked out, my nose and head split wide open, all of this done by the civilians working for Mitsui. The real torture was having to watch my friends die. Two of them, Wally Cigoi and Bob Bronge, had saved my life on The March. How I wish I could have saved them during our enslavement.

But it's not enough that they died, that we were never given an apology, and no sorrow was every shown, and these industrial giants that enslaved us went on to become multi-national corporations of the 21st century. It's not enough that thousands of us labored and suffered and died, and that these corporations have attained unimaginable prosperity. For, in addition, our government—the government of the land we love, that we fought and died for, and that had abandoned us on Bataan—is now standing in the way of justice. It is our government that is assisting these industrial giants who refuse to apologize or show remorse.

As soldiers, sailors and Marines we were able to deal with our government's decision to abandon us at Bataan. We were sworn to defend our country at all costs. Death and imprisonment are a part of war. And we faced them with courage and honor, proud to do whatever we had to do. But as decent and honorable human beings, we were never prepared for slavery, for the humiliation and inhumanity of being placed in the abusive servitude of private profit-making companies—companies that to this day have never publicly acknowledged what they did or asked for forgiveness for their atrocities. These corporations were unjustly enriched. They built empires on our labor. And they caused many of my friends to die.

Now their heinous crimes are compounded as they hide behind the rhetoric of some within our own government who incorrectly believe that a few lines written in an agreement long ago rob us—those who suffered as slave laborers—of our Constitutional rights. This, Mr. Chairman, *is wrong*. And, they cannot stand behind their misinterpretation of the facts. For all that is just and right about this great country of ours, it cannot be allowed to stand as said.

We, the defenders of Bataan and Corregidor were sacrificed once. We should not be sacrificed again. The first is understandable. The second is unconscionable. Our rights as veterans are being denied for the benefit of a few multi-billion dollar private, profit-making corporations, who were responsible for enslaving us during World War II.

What's troubling to us is that this is exactly what's happening, and it's open wounds you cannot begin to know. Our cause is about companies being responsible for their actions, it's about justice, justice denied us for such a long time, and it's about the respect and human dignity which were taken from us many years ago. You see, Mitsui stole my honor, they robbed me of my dignity, and they tried to force me to lose faith in my country. They thought they won, but they did not, for I never lost faith in my country or my God.

Since the war ended, I and others have tried to pursue claims against these companies because we know we were treated inhumanely. But at every turn, our State Department has voluntarily come to the aid of these Japanese corporations. Even in 1946, when I sought information about my rights, the State Department gave an evasive answer. In response to my letter dated September 11, 1946, the State Department wrote:

“With a view to rendering as much governmental assistance as possible to former prisoners, or their next of kin, and in order to obviate the necessity of their employing representatives or committees or associations to prepare their claims, representatives of the Department of State, War, Justice and Navy are currently engaged in devising procedures and in the preparation of official forms for the use of claimants who may desire to submit, for possible future consideration claims against enemy countries.”

The State Department’s letter ended with the following sentence, “Provision for the settlement of claims of labor performed by prisoners are for future legislative consideration.”

For 56 years, I have endeavored to obtain the meaning of this correspondence. The best I can come up with is two important points: First, the State Department urged us not to retain the services of counsel or obtain advice from any of the military service organizations. Second, our government leaders, through legislative procedures, were going to assist us in our quest for justice.

But here we are, almost six decades later, still waiting—waiting for the State Department to honor its commitment—hoping that we will not once again be abandoned by the government we revere. And, we have been waiting just as long for the Japanese companies to come forward and do the right thing. I can assure you, I never imagined I’d be here today testifying in front of this Committee 60 years after I became a POW on Bataan. But, despite my and others repeated efforts to resolve these claims directly with these international companies, such as Mitsui and Mitsubishi, they have refused.

So, finally, unable to wait any longer, in August of 1999, I and other former POWs sought justice in the California courts. Time was running out. But, once again, we were disappointed. The State Department immediately began to inject themselves into our cases and meanwhile, our ranks continued to die. In fact, since that day in August—only three years ago—we have lost thirty percent of the survivors of Bataan and Corregidor, over 1,000 former prisoners of the Japanese, not here for the justice we are seeking. And everyday we lose more. In fact, each month that justice is denied us, another fifty survivors will die, and this loss will increase over the years exponentially until there are no survivors left. That is why I am here today. If Congress doesn’t assist us, I fear none of us will live to see the justice we deserve.

For the life of me, I cannot understand why the State Department is so opposed to our seeking justice from the private companies that mistreated us during the war. Our claims are not against the Japanese government or the Japanese people, but against large multinational conglomerates that are headquartered in Japan.

I realize that the State Department argues that the 1951 Treaty signed with Japan bars our claims. But, I also know that several well regarded international law professors, including Professor John Rogers of the University of Kentucky, believe the Treaty does not bar those claims. And, I believe Professor Rogers is now likely to become a judge on the 6th Circuit, so I guess he must have some respect here in Washington. I hope Congress will read Professor Rogers’ and the other testimony from the Senate hearing held on these issues two years ago.

And, if you do, you’ll see that there are several reasons why the Treaty does not bar our claims, including Article 26 of the Treaty. This provision, which is typically called a “most favored nations” clause, states that if Japan makes a better deal with any other country, then they have to automatically provide that same opportunity to all the signatories of the Treaty, including the United States. At the Senate hearing, Professor Maier of Vanderbilt Law School explained that citizens in at least eight countries have received greater benefits than we have. I don’t understand why the State Department is still denying the facts when they seem so clear.

It is especially troubling now that our leaders are again asking our nation’s young men and women to put their lives in harm’s way, to be willing to risk all in the name of freedom. Their request comes with the implied promise that for what they will give, they will never be forgotten. Yet here before you today is a case where veterans of a war fought long ago have been forgotten, forsaken and even insulted as certain members of their government assist the wealthy corporations that enslaved them years ago.

What message is being sent to our young people as they learn that the same leaders who are sending them to faraway lands are denying us the right to pursue our claims? Is this the message we want our men and women in Afghanistan, or possibly in Iraq, to carry in the back of their minds?

Mr. Chairman, we can no longer afford to try to understand the motives of the Japanese companies or the State Department. With our ranks dying at such a rapid rate, we cannot wait. Today we ask you for the support necessary to provide us with our long sought justice. We are asking you to let our courts decide what responsi-

bility these multi-billion dollar companies have for past crimes. Let them make the decision. Let them determine whether we are owed an apology and back wages for the slave labor we endured.

This is all we ask, Mr. Chairman. It is all we want. It is fair and just. It will heal open wounds and restore integrity to the greatest government on earth and it will reaffirm promises to those now serving. Please support us in our claims and please support H.R.1198, the "Justice for U.S. POWs Act of 2001."

We were very proud of the medals we were awarded while defending our country's freedom, but they have very little meaning if the Government of today, denies us the rights we fought for yesterday. We were there for our country when they needed us, now we need our country to be there for us.

I surrendered once; I will never surrender again.

Thank you.

Mr. GEKAS. We thank the gentleman.

We will now indulge in a round of questions on the part of Members of the Committee, allotting 5 minutes to each to pose such questions. We'll begin with the chair allowing itself 5 minutes.

Mr. McCallum, how do you respond to Mr. Tenney's assertion about the Netherlands and that lapse that he talked about?

Mr. MCCALLUM. Well, Mr. Chairman, the Netherlands' circumstance was a voluntary payment, not a treaty obligation. And what I think the focus has to be, in terms of the legal analysis, is whether or not any treaty arrangement allows national-against-national POW claims, a need we know of no treaty that allows prisoner of war claims to be asserted against the or not to be released and weighed in those circumstances. The Geneva Convention governs the responsibilities of the Japanese Government relating to the prisoner of war.

In addition, there is an issue in the treaty of a reciprocal release by Japanese nationals of any claims that they might have against American nationals, and that is a very specific benefit to the United States, not only in terms of the prosecution of the war that occurred, but also in the occupation of Japan and the years after.

Lastly, the issue has to do with the, there is an issue relating to who interprets and assesses the issue of whether or not any treaty is more advantageous. That, under separation of powers, is first the responsibility of the Executive Branch of Government, which is responsible for the foreign affairs of the United States, and then, number two, ultimately for the Judicial Branch. And so to the extent that this particular bill, 1198, attempts to define for the Executive Branch or the Judicial Branch what is a more favorable treaty or not, it usurps the constitutional functions that are reserved for those other branches of Government.

Mr. GEKAS. You do not believe that those constitutional impediments would prevent additional monthly payments to POWs based on the extent of their POW status, do you?

Mr. MCCALLUM. If the United States Congress determined to enact various benefits for prisoners of war relating to World War II or any other group of prisoners of war, the United States Congress could certainly do that based upon the circumstances.

Mr. GEKAS. What is the position of Justice and State in that? I would ask Mr. Taft as well to respond to that. What is the position of State and Justice to H.R. 5235, which has been referred to the Veterans Affairs Committee that would do just that, like an alternative solution to this situation?

Mr. McCALLUM. Mr. Chairman, before Mr. Taft jumps in on that, the devil is always in the details, and I have not reviewed that particular bill.

Mr. GEKAS. I'm talking about the theory of it.

Mr. McCALLUM. In theory, from my perspective, the United States Congress could certainly, through the Department of Defense and the Department of Veterans Affairs, come up with various proposals for legislative appropriations of benefits to veterans, including POWs. So one would have to examine the specifics of any particular bill, but that is certainly within the purview of the Legislative Branch of Government.

Mr. TAFT. Mr. Chairman, I would just say that from the point of view of the State Department, this approach to the problem of inadequate compensation for our veterans is the right way to go, if that is what the Congress feels that more should be done for any category of POWs. They should certainly do it, and that bill addresses it directly. Certainly, there would be no objection on our side to that.

Mr. GEKAS. Of course, that does an end run around corporate liability on the part of the Japanese companies. That is the outcome of that theory.

Mr. TAFT. Mr. Chairman, I think that that end run, and that's one way of characterizing it, there were some benefits from the end run, but that end run was run in 1951. That's the problem we have. That was done, and the Congress knew it was doing it, and now we need, if there is a problem, we need to fix it directly.

Mr. GEKAS. Mr. Tenney, I have a specific question for you.

Of your knowledge, do you know whether any of the operators/owners of the corporate giants to whom you refer, were they ever tried for war crimes?

Mr. TENNEY. No, sir. To the best of my knowledge, I do not believe they were tried—the soldiers, military, but I don't know of any of those.

Mr. GEKAS. I'm going to direct the staff to make an inquiry as to whether the War Crimes tribunals that were held in Japan, following the conclusion of World War II, included allegations or charges against the individuals to whom Mr. Tenney referred.

Mr. TENNEY. Mr. Chairman, with regard to your question to both Mr. McCallum and Mr. Taft, I would like to just add this. I do not believe that we, former POWs, who are seeking an apology and justice, feel that the United States owes us a thing. They don't owe us. We fought for them, we did what we were supposed to do, we did our job. Our cause of action is against private companies who violated our human rights, and to let the United States Government pay us now would be really, really getting the Japanese off the hook completely, and that's not what we're looking for.

I think that the problem is everybody thinks we're looking for money, and money is not the issue. The issue is really very simple. We want justice, we want honor, and we want some of these things that we've been entitled to, not from the American Government to have to give it to us, that we're asking for a handout. What we're asking for is justice. We think the courts of our land can give us justice. We don't want to see the Japanese companies off the hook.

Mr. GEKAS. You have been a strong advocate, Mr. Tenney. We admire your tenacity and your clarity in these matters.

The chair recognizes—

Mr. ROHRABACHER. Mr. Chairman, first of all, could I ask permission to put into the record legal statements on the 1951 Peace Treaty by three distinguished professors of law—Michael D. Ramsey of the University of San Diego Law School, Harold G. Maier of Vanderbilt University, and John Rogers of the University of Kentucky College of Law that totally refute and repudiate the interpretation of the treaty that was just presented to us by the State Department.

Mr. GEKAS. Without objection, the documents will be entered and made part of the record.

Mr. GEKAS. The record also should indicate that the gentleman from California, Mr. Issa, is present.

The chair recognizes the lady from Texas for a 5-minute round of questioning.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

Dr. Tenney, thank you very much. Accept my apology for stepping out. There was a meeting with a number of officials from Afghanistan, and obviously you realize that America is fighting on several fronts, and particularly fighting in our commitment to, one, rebuild that Nation, but also to fight against terrorism. So I thank you very much for your indulgence.

And let me thank you again for your presence here, knowing the long journey that you have traveled, not only the one you traveled in the Death March. In fact, I had a constituent who just in the last 2 years I was able to secure a number of medals that his records had been lost who gave me the details of the Death March and what you have eloquently, but very strikingly, said that none of us could imagine, none of us.

Let me thank you as well for the commitment and loyalty to this Nation. I think it's very clear what you're speaking of, and that is simply, as I hear you Dr. Tenney, you want your day in court; is that what I understand you to be saying?

Mr. TENNEY. That's correct, 100 percent correct. I want my day in court, and let the courts make the decision, and I'm willing to live with whatever they decide.

Ms. JACKSON LEE. Well, I want to get that loudly and clearly on the record, and I don't think Congressman Honda was in the room when we acknowledged him, and I want to acknowledge his leadership on this bill, but I do want to just, if you don't mind, and I capture one or two more questions just to restate what I heard in your testimony of that experience; that food and ammunition ran out, that you all were prepared to fight, but you lost both food and ammunition that was supposed to come to you as you were entrenched, I guess, during that time frame; is that correct?

Mr. TENNEY. That is correct.

Ms. JACKSON LEE. And that during the course of that march, then, you were being attacked, and they would then bury people, decapitate people, shoot individuals that were serving our country.

Mr. TENNEY. That is 100 percent correct.

Ms. JACKSON LEE. I think that's important to note because that was in the act of war, but then you got or then you became a pris-

oner of war, and then you moved from being a prisoner, in terms of sitting there not getting the nutrition that you need, because you noted 500 calories a day, to being almost a slave because you were put to work; is that my understanding?

Mr. TENNEY. Not almost enslaved, but we were enslaved.

Ms. JACKSON LEE. Thank you very much for correcting the record.

Mr. TENNEY. Thank you.

Ms. JACKSON LEE. I think I said that so that you could correct the record. I think this is, this is—the reason why I wanted to focus on this, Dr. Tenney, because I think the Congress has to act in extraordinary circumstances.

This is not a typical circumstance, where we're coming and just saying, move the courts aside, move the Administration aside, we want to interfere. This is an extraordinary circumstance, where Americans were enslaved, and I imagine maybe others, and therefore worked without compensation by companies that, in essence, the things that I hear them doing to you, beaten, terrorized, to a certain extent, back broken, shoulder broken, teeth knocked out, these are by the employers, corporate employers, that were using your labor for free, slave labor.

Mr. TENNEY. That is correct.

Ms. JACKSON LEE. And so what I would say to the Administration, and I make a point in my statement that this is not a Democratic issue or a Republican issue, it's gone through a number of Administrations, but what I would say, Dr. Tenney, is that we are debating an enormously important issue right now that will make a determination as to whether we go to war.

There are treaties in place that the Administration is talking about breaking, and so I think that when we have circumstances like that, and whether or not they, in this instance, believe it's an extraordinary circumstance, I don't know, but we do have an extraordinary circumstance that I think gives us room to break a Treaty, to modify a Treaty, in order to give you your day in court.

Would you just, for me, tell me how long, when the case was filed. If I'm correct, you had a case filed, and when was that filed?

Mr. TENNEY. My case was filed August 15th, 1999 in the State of California.

Ms. JACKSON LEE. Is it a class action? What number of individuals do you think would be impacted?

Mr. TENNEY. Well, I can't give you technical information, I really don't know, but I will share this with you. When I approached my attorney, when the California law was passed, it allowed us to extend the statute of limitations, and I provided them with some evidence that I had that I had kept for many years, letters, direct letters written on Japanese stationery, from the doctors in prison camp, which spelled out that I was beaten in the coal mine by overseers with a hammer and a pick axe. When they saw that, they said this is something we can now prove. There's no question about this any more. It's not hearsay.

The case was filed, and my case was filed as an individual. I understand that right after that many of my colleagues wanted to join, and there was a class-action lawsuit then filed on their behalf also in California based on the California law.

Anything more than that, I really don't know because I don't know the technical part of it.

Ms. JACKSON LEE. That's very helpful.

Mr. TENNEY. I'm not an attorney. I want to qualify that.

Ms. JACKSON LEE. That's very helpful. Mr. Chairman, I know my time is up. I'd simply ask that this Committee, unless we have a second round, has a swift response to this legislation, passing it, having a mark-up, passing it through this Committee, and moving it swiftly and quickly to the full Committee, and quickly and swiftly to the floor and seeking the assistance of the other body to move this quickly forward for what I think is more than a long overdue justice to Dr. Tenney and all of those who offered the greatest sacrifice for us.

Mr. TENNEY. Thank you very much.

Mr. GEKAS. The chair recognizes the gentleman from Utah, Mr. Cannon, for a round of questioning.

Mr. CANNON. Thank you, Mr. Chairman, and I'd like to thank the panel for a very clear and direct set of statements, and I would like to apologize to Dr. Tenney. I have to leave after my questioning here because I've got another commitment. I hate to do that, and I appreciate your position and what you said here today, and I'm sorry that I can't be here for the rest of the questioning.

Let me just ask a couple of questions of Mr. McCallum and Mr. Taft directly. You have asked for an extension of time on the FOIA request that would go through the end of December 2003. Dr. Tenney talked about that. I recognize this is a huge amount of work to do to get the documents out and will take a lot of manpower, but it seems to me that given the age of the people we're dealing with here and the importance of this, that you could use more manpower and do it in a lesser amount of time. Is that not possible, both from a legal perspective, and also from the Department's perspective?

Mr. TAFT. Well, Congressman, I think that we have asked for that amount of time. I would hope that we would be able to provide information as it becomes available. We are ready to do that, and I've had discussions, in fact, with a number of Members of Congress about that.

Mr. CANNON. Let me just interject—

Mr. TAFT. So the deadline is later, but I think we need to do what you say, is act as quickly as we can.

Mr. CANNON. So you will make documents available, as you are. And I take it does that mean that you're committed to work with counsel for the plaintiffs in the case to expedite the focus of your search?

Mr. TAFT. That's right. Our idea is not that we would wait until the final time that the court has given us and only then make available the first document.

Mr. CANNON. Thank you.

Mr. TAFT. I think we ought to make them available—

Mr. CANNON. I appreciate that. Because my time is short, I do have a couple of questions, and I apologize for cutting you off, but I'd like to move forward. I appreciate that commitment, and we'll follow up on that and watch how that develops.

Let me just ask you, you have here a number of issues in contention. Certainly, Mr. Rohrabacher has made it clear that he believes that a number of qualified lawyers believe that the Treaty is not as clear as both you, Mr. Taft and Mr. McCallum, have suggested.

Do we have someone in the system here from the Department of Justice or the Department of State who is pushing to help bring about a settlement of the case so that these great heroes can have an apology that they deserve, some money from the companies that exploited their labor, and at the same time, perhaps some help from the Federal Government? Do we have someone who is pushing a settlement?

Mr. TAFT. I can speak to that. We have been in touch with the Japanese government and with some of the companies, and I would have to say that we have not been encouraged that they are prepared—

Mr. CANNON. They're not encouraging.

Mr. TAFT. We have not been encouraged that they are prepared to settle these suits.

Mr. CANNON. Has either the Justice Department or the Department of State ever suggested to any of these corporations that they don't need to worry because you will help stop these cases from moving forward?

Mr. TAFT. We have told the Japanese Government that we understand the Treaty, the way we've been explaining it here, and that that is the position that we will take, and they have asked us what position will you take in the court, and we have told them, and that's the position we have taken, and it's well-known.

Mr. CANNON. Has that had the effect of chilling any interest on the part of these defendant companies to come forward and negotiate? This is a PR nightmare for these people, and yet we're not seeing any reaction from them. And it would seem to me, just on the basis of their market share in America alone, they ought to be concerned about this.

Has there been any talk about that? I mean, you can talk about your position.

Mr. TAFT. Yes, we have made those points to them, and we have tried to tell them that this is something that we would like them to be more forthcoming on, but we have not gotten a response.

Mr. CANNON. Pardon me, Mr. Taft. I don't mean to cut you off, but I'm short on time.

Is there an individual who's responsible for making that case to the Japanese companies?

Mr. TAFT. This has been done both in Tokyo and here.

Mr. CANNON. By the State Department.

Mr. TAFT. By the State Department.

Mr. CANNON. Do you have an individual who's working on it, who's responsible for it?

Mr. TAFT. We have been in touch with them. Yes, I'll provide you with the information about it.

Mr. CANNON. Thank you. And then one final question, if I might. You talked about this is essentially a claim against the Federal Government. That is part of the jurisdiction of this Committee, as well, and you have said if we find that there are hardships, and

you described it I think eloquently, and Mr. McCallum went on to describe the hardship that these people actually did suffer.

Am I to take it from your statements together that the Administration is suggesting that we should do a claim bill on behalf of these people who were used as slave labor?

Mr. TAFT. As far as I would go is to say, if we conclude that the amounts of compensation that have been available are not adequate and that they should be more generous, then that is something we should deal with. That is—but as to what we conclude, I think that really is not a State Department matter or even a Justice Department matter. It's really for DOD and the Veterans Administration as to amounts and so forth, but that's the way to go.

Mr. CANNON. Mr. McCallum, my time is up, but would you like to respond to that?

Mr. MCCALLUM. I agree with Mr. Taft. Basically, the United States Congress, in conjunction with the Department of Defense and the Department of Veterans Affairs, obviously should consider exactly what would be appropriate under these circumstances.

And Dr. Tenney, as we all agree, states a very compelling case.

Mr. CANNON. Mr. Chairman, may I ask unanimous consent to ask one other question?

Mr. GEKAS. Without objection.

Mr. CANNON. Thank you.

If Congress were to take some action to create a fund to compensate these heroes, would the State Department be aggressive with the Japanese companies involved to do some kind of matching or funding for the compensation of the slave labor that they exploited?

Mr. TAFT. I think we would be making a proposal, and, frankly, I think that the reception of such a proposal, in the context of the U.S. Government also doing something, would be perhaps better than what we've received so far.

Mr. CANNON. Thank you, Mr. Chairman. I yield back.

Mr. GEKAS. We thank the gentleman.

We turn to the lady from California, Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman. Like Mr. Cannon, I have a roomful of people waiting for me in my office, so I'm going to have to leave after I have a chance to ask a few questions as well.

First, Dr. Tenney, let me just express my thanks to you for being here and your very moving testimony. I was born in 1947, and my dad, who was also a World War II vet, passed away last November, and I know that generation that really saved the world is one-by-one leaving us, and it is important that we get justice before your generation is all gone from this Earth, and that's really what I think it is about.

I appreciate the comments about the Fund, and Lord knows we don't do enough for our veterans, but that's not what this is about. This is about justice, not about our failure to do what we should do for American veterans.

So I guess the concern I have—I'm not going to ask you, Mr. Taft or Mr. McCallum, if you have had, unless you have had a chance, but in reading the analysis by the three law professors, I thought that there was some compelling analysis there, and I would very

much like to get your written response to their points of view, rather than get a back-and-forth here that might not be scholarly. Because I think if we're trying to find a solution, I think a solution can be found.

And so the question is have we, I mean, frankly, listening to Dr. Tenney, I think the apology is more important than any financial issue, in terms of justice, and the treaty doesn't preclude an apology, does it?

Mr. TAFT. I think the answer to your first question is we'll be glad to provide you with the analysis that you have requested, and the answer to your second question is, of course, the Treaty does not preclude an apology. There have actually been a number of apologies made by Japanese officials—the Prime Minister, the Foreign Minister, on different occasions—

Ms. LOFGREN. Well, the companies that got rich—

Mr. TAFT [continuing]. Specifically recognizing the POWs as well.

Ms. LOFGREN. The companies that got rich off of the slave labor of our American heroes need to own up. If you look at the German companies that got rich off of the Holocaust victims, they owned up. I mean, not only did they pay, but they came forth, and they did the right thing. And I really think that a Nation cannot heal, and a country can't heal, until they come clean on what they've done that's wrong.

I guess my question is, pending your analysis of the three law professors' points, have you made an effort to try and get these offending companies to come forward, without regard to whatever you think about the Treaty, but they need to come forward in order to maintain a good relationship with the United States to provide for a fund that would be available to POWs who are seeking justice?

Mr. TAFT. I would say, first of all, I agree with you. The German companies, by and large, have set a good example. The Japanese companies have a different record.

Ms. LOFGREN. Well, it just seems to me that you're the State Department. You're supposed to be negotiating with all of these other Governments, and if we could put the Treaty issue to one side if these companies anted up with the money and let the courts go ahead and proceed using the funds that they were to deliver, and then also if the State Department were to provide the oomph for the apologies.

Congressman Rohrabacher?

Mr. ROHRABACHER. Ms. Lofgren, let me just be very clear. About 6 months ago, if not longer, I talked to our Ambassador in Tokyo, and I've talked to State Department people on numerous occasions, suggesting that they go to these corporations and find an out-of-court settlement, and perhaps suggesting that these Japanese corporations could do something, set up a scholarship fund for the grandchildren of these veterans, just an apology and something as simple as that.

But, no, this is arrogance on the part of these companies who tortured our heroes, number one; and, number two, Mr. Cannon touched on it, they feel why the heck should they do it? They've got the United States State Department covering for them right here

in the United States. So we have our Government creating a disincentive for these corporations to do this, and it's outrageous.

Ms. LOFGREN. If I may, Congressman Rohrabacher, I think you're right, and you and I are probably at the opposite ends of the political spectrum, but oftentimes we see things in a similar way when it comes to our veterans or human rights issues.

And it seems to me that if we can insist on tax treatment for American companies that the EU says violates WIPO, if we can have the President impose steel export tariffs for Pennsylvania, then certainly we can have the State Department stand up for guys like Dr. Tenney, who did everything that was asked, and far more, and if we do that, we might get some justice.

Mr. ROHRABACHER. Ms. Lofgren, I happen to believe that if these fellows would have been assigned to find legal ways of helping our POWs, you would have the same folks presenting a totally different argument today. Lawyers are assigned to find, and back up, certain legal positions and, unfortunately, other countries assigned their lawyers to back up their citizens; our country, and our State Department, our Government doesn't back up our citizens.

Ms. LOFGREN. I don't want to pick on Mr. Taft and Mr. McCallum because they're doing their job. Perhaps really our argument is with the Secretary of State, with the decision-makers on this point.

I see that my time is expired. I don't want to cut you off, Mr. Taft, if you're going to—I don't want to take unfair advantage.

Mr. TAFT. Thank you. I think I do need to just say that we have been speaking with the Japanese Government, with the Japanese companies on behalf of our citizens. We have been doing that for some time, and in many different ways, and we have not been as successful as I wish we had been, but it is not for lack of interest and support, and trying to get something done.

Ms. LOFGREN. Well, if I could just, finally, Mr. Chairman, if you were to be persuaded by the three law professors, maybe we would get their attention, and I would hope that that might be the case.

Mr. TAFT. Yes. Well, we will get you the analysis on that.

Mr. GEKAS. The time of the lady has expired.

The gentleman, Mr. Forbes, is recognized for 5 minutes.

Mr. FORBES. Thank you, Mr. Chairman.

And, Dr. Tenney, thank you for your service to the country and for being here, and, Mr. McCallum and Mr. Taft, thank you for being here. I know you don't have a particularly popular position maybe before the Committee, and, unfortunately, you don't represent the entire U.S. Government, but you're all we've got today, so we have to throw these questions at you.

I'm going to be as succinct as I can because I only have 5 minutes, but the first question I have, which I have implied from what you have said and the questions, is, in your opinion, did the United States Government have the authority to release Dr. Tenney's claims against these Japanese corporations?

Mr. MCCALLUM. As a matter of law, yes. Constitutionally, the United States Government would have the authority to do that, in terms of national-to-national release of claims, Government-to-Government release of claims in the course of the negotiation of a Peace Treaty.

Mr. FORBES. The second question is, in your opinion, I take it, then, that you believe the United States Government did release these claims.

Mr. MCCALLUM. In fact, the record is replete with the concept of releasing those claims in order to assure the development of a democracy and a strong economic democracy in Japan, which has been extraordinarily successful, and we have a 50-year history in which that Treaty has always been interpreted in that vein.

Mr. FORBES. The third thing is what did the U.S. Government give Dr. Tenney to release his claims?

Mr. MCCALLUM. Under the War Claims Act, a fund of money was appropriated. Assets of the Japanese in the United States was appropriated, and that fund of money, plus any additional funds that would be appropriated by the United States Congress, were set up under a War Claims Commission, which then compensated prisoners of war, based upon the sorts of treatment and mistreatment that they experienced.

So prisoners of war who were involved in forced labor, there was an element in the War Claims Commission that allowed for compensation.

Mr. FORBES. Dr. Tenney?

Mr. TENNEY. Mr. Forbes, in response, let me just say that, to the best of my knowledge, as the recipient of such awards, there was never, in my awareness, any differential to any prisoner of war, based on what they went through or what they did. We were allowed, and when I first was told, I was going to get a dollar a day for every day I was a prisoner, and that originally was told to me that it was for compensation for the food that I did not get. It was a compensation. I was never told that it was intended to be anything from Japan.

Then I got a—then they were supposed to pay a dollar and a half a day. I never got the dollar and a half a day, mainly because I never applied for it because mainly I was never told about it.

The State Department, during those years, claimed that they made a lot of information available to a lot of people, but they did not do it to individuals. What they most probably did was do it through organizations.

I was a member of an organization. I went to the first two meetings of the American Defenders of Bataan and Corregidor. The men were so negative about life that I said I can't stay there any longer. I had to get on with my life, and I had a 45-year hiatus that I never went back to another meeting because I wanted to get on with my life. I couldn't stand the negatives that I was listening to.

So, if there was anything given to the organizations, I never knew anything about it, but I did get the dollar a day, and I was told, at that time, that it was for compensation for the fact that they did not have to feed me during those three and a half years, but that's all I got. And there was never, never, to my knowledge, any money ever given to anyone for treatment that they went through, for being tortured for being—nothing. The only thing we got was one dollar, and if Mr. McCallum knows that there was money given to others for different things, I would like to know more about it.

Mr. MCCALLUM. There was, as Dr. Tenney indicates, \$1.50 that was for an additional element of compensation that was for two things—for forced labor of prisoners of war, and, number two, for inhumane treatment. So if one could prove either of those two, one could obtain an additional dollar-and-a-half per day, in terms of the compensation program that was established.

Mr. FORBES. Mr. McCallum, I don't mean to cut you off, but I've only got a few seconds left. If that is, in fact, the case, I think the United States Government has committed malpractice, if you would, in releasing the claims that Dr. Tenney has, if that's all that he got. I mean, to have waited 50 years, 60 years almost, and not to have compensated him more than that is difficult for us to handle.

I know last year we had about 500,000 VA claims, some of them going back to 1965, and year after year all of these veterans get is a letter saying we're going to get back to you. Well, it's time we get back to Dr. Tenney.

My last question would be do you know of any other remedy that we have that's currently before Congress or has been put before Congress that would compensate Dr. Tenney, other than this particular piece of legislation?

Mr. MCCALLUM. It is my understanding that there are various other bills that have either been proposed or submitted, but I don't have the details of any of those.

Mr. FORBES. My time is out. If you could just submit those.

Mr. TAFT. Congressman Simpson and Senator Inouye have a bill that is identical in both Houses, which is one. There may be others.

Mr. FORBES. Good.

Thank you, Mr. Chairman.

Mr. GEKAS. We thank the gentleman.

We turn to the gentleman from California, Mr. Issa, for a round of questions.

Mr. ISSA. Thank you, Mr. Chairman, and I'll try not to repeat questions, but they may have a similar vein to them.

Dr. Tenney, first of all, you know, I know people apologize for other people's acts, but you certainly have, from my family, a deep feeling of empathy. Both of my uncles were in German prisoner of war camps, came home without their teeth, and they didn't begin to have the kind of mistreatment that you had because there was, in those camps, there was no willful mistreatment, they simply were starved half to death, as were their guards toward the end of the war.

I do have a couple of questions, Doctor, for you. I guess, because it's a class-action suit, you can't speak for everyone, but perhaps just for yourself. If the State Department were to use its best efforts, were to, in fact, get the appropriate apology for the acts of corporations still in existence, but CEOs and executives probably long dead, and were to get what would be considered to be similar compensation to what the Japanese courts have awarded recently, such as the case of China, would that meet your requirements of an attempt by your Government to get you the kind of justice that you feel you deserve, realizing that money does not make up for what you suffered?

Mr. TENNEY. My response to that would be, number one, I don't know what the amount of money was, and the actual amount I think was, some of the Chinese prisoners who happen to work in my prison camp, in my coal mine with me, by the way, were awarded something like \$88,000.

Mr. ISSA. Something like that.

Mr. TENNEY. But that is not the important issue. I think I would be very happy, number one, if our courts were to allow us the justice we need; number two, I would be happy to receive an honest response from the company saying we're sorry; and, third, I think they owe me for the labor that I did, and let them make the decision of how.

I would rather not even come close to saying whether I'm willing to take \$10 or \$10 million. I don't care. That's not the point. Let them decide, but let them first admit that they did something wrong, and now they want—they've decided now that we worked for them for a certain number of days, certain number of hours. You're entitled to be paid like anybody is entitled to be paid. Let them pay me for it, and whatever that amount happens to be, that would be fine with me.

Mr. ISSA. Well, you know, I'm a cosponsor of this bill, and I believe very much that you deserve your day in court. I'm also an American who believes that very little ever gets resolved in court, and that if at all possible, this bill should seek to motivate the State Department to make those efforts, send a clear message to Japan that, as I understand the case, and Mr. Taft, I'd like to ask you for a little understanding of where I've gone wrong perhaps.

We have a contract with a foreign nation. I have no argument with not wanting to reopen it, but if it has the Most Favored Nations Clause, and it apparently does—no one is arguing that—and if Japan has, in its own courts and through other agreements with foreign countries, made payments over and above those payments which were agreed to in our contract, then without going into Ph.D.s on both sides, and lawyers, who, as Congressman Rohrabacher said it, start off knowing where they have to end up in the thought process. They try to make an argument for the side which brought them to the table, which is their job to try to be advocates for that position.

Isn't it common in the profession of law, civil law, when you write a Most Favored Clause, that in fact, if there appears to be better terms later, that it is reasonable, prudent, and right to go back to the party and ask for that enrichment? Isn't that routine in civil law?

Mr. TAFT. If you have a strict Most Favored Nation Clause and a Trade Agreement, that is the way that it works. We have looked at article 26, and also article 14, and we don't believe that it actually operates quite that way, but even if it did, we don't see anybody getting a better deal than we have for the reasons Mr. McCallum—

Perhaps, without taking any more of your time, we should include that in our response to the legal arguments that Congressman Lofgren had. It might be a better way.

Mr. ISSA. I appreciate that, but I maybe can add one more thing to that written response. If I understand correctly, other Nations

entered into agreements similar to ours, putting to an end the past, the reparations, if you will, and subsequently individuals have received additional dollars from Japanese companies or Japanese courts or some other group, other than their own countries; isn't that true?

Mr. TAFT. As I understand it, well, everybody signed, actually, a lot of people signed exactly this agreement at the same time we did, including the Netherlands. I think one of the issues is a voluntary payment that the Japanese made to Netherlands' civilian internees, not POWs, in 1956, and they had agreed to make it earlier, and we think that as a voluntary payment, that that does not implicate the Treaty provision.

Mr. ISSA. I know my time has expired.

Mr. MCCALLUM. That is correct.

Mr. ISSA. I would like to go on record as a proponent of this bill, saying that it appears to me, and it doesn't seem to be argued, that there have been additional enrichments, under some form of pressure, not just, as they used to say, *sui sponte*, that somehow somebody out of good will just decided that they would write a check, and that those payments do, in fact, create at least an obligation by the State Department to seek a positive outcome for these individuals.

Whether or not that can be achieved, I certainly think this legislation is required to go forward in order to create a pressure for that to happen, and I hope you'll understand that's a strong feeling by many of us in the Congress.

Mr. TENNEY. Mr. Chairman, I have a copy—I have a lot of copies. I keep everything—I have a copy of a letter, September 8th of 1951, signed by Shigeru Yoshida, Prime Minister of Japan, a letter addressed to the Netherlands. I won't read the whole thing, but briefly it says, "With regard to the question mentioned in the executive letter, in view of the constitutional legal limitations referred to by the Government of the Netherlands, the Government of Japan does not consider that the Government of the Netherlands, by signing the Treaty, has itself expropriated the private claims of its nationals."

There is a part of article 26 that Japan has said to the Netherlands, by signing the Treaty, Mr. Netherlands, if you sign it, we're not going to eliminate the benefits, and so if they don't have this letter, I'll be happy to make it available to the State Department.

Mr. ISSA. I certainly would appreciate a copy of it.

Mr. GEKAS. We thank the gentleman.

The lady from Texas moves to strike the last word, and it will be the last word.

Ms. JACKSON LEE. Mr. Chairman, thank you very much for your kindness.

I was listening to my colleagues' questions with respect to the State Department, and I want to ask, on the issue of diplomacy, how far up has this request, this issue, gone with respect to diplomacy? Has there been any contact between our Secretary of State and comparable leadership in Japan with respect to being able to handle this from a perspective of diplomacy and negotiations? Do you have any knowledge of that?

Mr. TAFT. Yes. We have raised this, as I said, at the embassy in Tokyo and here in Washington, at different levels, but very high levels, that it would be desirable to reach an amicable settlement of these cases. That has been done.

Ms. JACKSON LEE. Has it been raised by the Secretary of State?

Mr. TAFT. I will have to check specifically about that——

Ms. JACKSON LEE. Would you check it for me.

Mr. TAFT [continuing]. And we'll give you a report.

Ms. JACKSON LEE. In your response on the letters that were requested by Congresswoman Lofgren, I assume they're going to come to the Committee, and then it would be helpful, and we can all get a copy of your responses.

Mr. TAFT. Of course.

Ms. JACKSON LEE. Appreciate it.

I just need a question on Dr. Tenney. Dr. Tenney?

Mr. TENNEY. I'm sorry.

Ms. JACKSON LEE. That's all right. That's all right. You have been here long.

Mr. TENNEY. I was not sleeping, I promise you.

Ms. JACKSON LEE. No, you're not. You have not shown any sign of that, my friend.

Just for the record, I know you might have said it, your Ph.D. is in what, may I ask?

Mr. TENNEY. Pardon me?

Ms. JACKSON LEE. Your Ph.D. is in what?

Mr. TENNEY. Finance from the University of Southern California.

Ms. JACKSON LEE. So you have lived your life in spite of—you have gone on with your life in spite of, achieved a Ph.D. I assume you got that after World War II.

Mr. TENNEY. Oh, yes. I got it at the age of 50.

Ms. JACKSON LEE. At the age of 50. I just wanted to have that for the record.

But did you state that you had received some form of compensation?

Mr. TENNEY. Yes, ma'am, I did. I received a dollar a day for the three and a half years that I was a prisoner of war.

Ms. JACKSON LEE. What would that—your math—can you give me a ballpark, dollar a day, 365; is that what is?

Mr. TENNEY. Well, I got it from the United States Government, and I beg you to be with me on this. Here we were. This was 1951 or 1952 or something like that. You have to understand that I was 30 years old, I was just trying to get on with my life. If I got a letter saying that I got a dollar a day, I took the dollar a day, and man that was very, very important to me at that time, going to school, trying to get an education.

I was told, at that time, that that dollar a day was strictly for the food that they did not give me while I was a prisoner. As you know, any military person today or years ago who lived off-base was given an allowance for that purpose.

Ms. JACKSON LEE. Yes.

Mr. TENNEY. So when I got the dollar a day, that's how I was interpreting it, that it was for this allowance that the Government did not pay me.

And so I decided—I mentioned earlier—I decided to get on with my life. I went back to school, I took advantage of the GI bill, which I was grateful for, to try to get an education. My education stopped in the middle when I was raising a family. That's why I waited of for another 18 years before I went back to school again, not on the GI bill the second time. I paid my own way to go back to USC to get my doctor's degree.

Ms. JACKSON LEE. I'm going to close, Mr. Chairman, because of your kindness. I just want to say I wanted that clarified on the record, Dr. Tenney, so that no one would think that you had been overwhelmed with any compensation, and that that would negate any further compensation that you might have.

And I'd also say to the State Department, I'm sorry that my colleague has left, and I noticed he used the word "reparations," I hope that, for precedence sake, our Department, our Federal Government is not running away from being able to address your concerns because of the terminology, because I think that we do well to ensure that reparations are fairly distributed to all who are deserving of such, and so I yield back and hope that we will be able to resolve this at all levels.

Thank you, Dr. Tenney, for your bravery, loyalty, and your presence.

Mr. TENNEY. Thank you. I humbly say thank you. Thank you very much.

Mr. GEKAS. The chair is inspired to say that it was noteworthy that Congressman Rohrabacher remained throughout this whole hearing, listened to every word, rendered his opinions when he thought it was necessary to do so and, in general, shepherded this whole issue to this Committee and through this Committee. This was an extraordinary, to me, an extraordinary gesture of statesmanship on his part.

And of course the witnesses, in their own vein, were excellently received by the Committee, and we will consider all of their testimony in the final resolution of this—

Mr. ROHRABACHER. Mr. Chairman, in that spirit, if I could just state that a few moments ago I talked about lawyers doing what they were assigned. That, in no way, should signify that I don't admire and respect Mr. Taft or Mr. McCallum. It's the policy of the Government that I am upset with, and they are doing a very good job for their respective employer and what the employer wants from them, and it wasn't meant at them, it was meant at the bosses that have directed what policy we should have.

Mr. GEKAS. The fall of the gavel will indicate a salute to Dr. Tenney.

We are adjourned.

[Whereupon, at 4:35 p.m., the Subcommittee was adjourned.]



## A P P E N D I X

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### MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE  
IN CONGRESS FROM THE STATE OF TEXAS

Mr. Chairman, today our Subcommittee will here testimony on behalf of H.R. 1198, offered to the House by my colleague Mr. Dana Rohrbacher. I know that the issues that the Subcommittee will hear today are controversial. On the one hand we as a nation have an interest in living up to our international agreements, however, doing so at the expense of the very soldiers who maintained freedom in the world is a high and tragic cost.

It has been my hope that the United States working through the State Department and other appropriate offices could resolve this dilemma without forcing Congress to take legislative action on this important matter of former American POW's forced into slave labor in Japan by private Japanese companies that profited from their labor. This issue is a matter of national pride as it goes to our treatment of those who have risked their lives for the liberties that we enjoy today.

The stories of World War II (WWII) are now solidified in the annals of American War history. Perhaps one of the most heroic accounts of WWII is the account of Allied forces, including Americans, that were forced to surrender Bataan to the Japanese in the Philippines on April 9, 1942. These prisoners of war would go on to endure what has come to be known as the Bataan Death March. Soldiers who endured the march including some Ten to Twelve thousand Americans, were forced to march some 60 miles in extreme heat. After the march the prisoners were interned and subsequently placed in the hold of Japanese Freighters bound for Japan. On arrival in Japan, these prisoners would face further trials and tribulations. There, these prisoners were forced into slave labor for private Japanese companies.

Now, some fifty years later, we sit to determine whether the men and women of our armed services that fought gallantly to preserve our freedoms and suffered mightily as a result of their gallantry deserve the opportunity to pursue some modicum of reparations for their travails in our courts. In doing so, we must take account of the global and political agreements that this nation has committed to in the aftermath of WWII. We know the horrors of the story of Bataan, for example, it is widely accepted that our government, following the war instructed many of the POW's held by Japan not to discuss their saga. However, as much as we have tried to ignore this issue, it still remains to be resolved.

The state of California has taken matters into its own hands passing a statute that extends the statute of limitations for WWII claims until 2010. Supporters of H.R. 1198 point to this fact and the fact that agreements were reached between German companies and Jewish Holocaust victims that were forced into slave labor on behalf of German companies as justification and precedent for this legislation.

I am looking forward to hearing the testimony on both sides of this issue. I look forward to hearing the state department's response to the argument made by our veterans that this is not a dispute with the Japanese Government. I look forward to hearing its response to what seems to be a meritorious argument that these are private claims against the private Japanese companies that profited from the slave labor of our imprisoned American soldiers.

I am anxious to hear testimony as to whether or not the state department has made adequate efforts to resolve these veteran's claims. I am anxious to find out why the Justice Department filed damaging statements of interest in the litigation surrounding this matter.

I would emphasize that I am not singling out this administration. This is an issue of fifty years—obviously spanning many administrations. I know that Congress has attempted to address this issue unsuccessfully often under outright pressure from

administrations determined to prevent legislation concerning this issue from moving forward.

I look forward to hearing from the witnesses as to reason for and against moving this legislation forward. Thank You Mr. Chairman.

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PREPARED STATEMENT OF THE HONORABLE ZOE LOFGREN, A REPRESENTATIVE IN  
CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman. I would like to thank you for holding this hearing on the Justice for U.S. Prisoners of War Act of 2001. I would also like to thank our panel of witnesses, Mr. Taft, Mr. McCallum, Congressman Rohrbacher, and Dr. Tenney for taking the time to be here today. Finally, I wish to commend my distinguished colleague, Congressman Honda, for working with Congressman Rohrbacher to bring positive resolution to this issue. Because of their leadership, we now have an opportunity to provide relief to World War II veterans who have been fighting for justice for more than fifty years.

Today we will hear about more than 30,000 soldiers who became prisoners of war in Japan during World War II. We will be told how these prisoners of war were forced to endure the Baatan Death March during which thousands of soldiers perished after many days of torture, beatings, and starvation. Those that miraculously survived were later sold as slave labor to Japanese companies. We will hear that even after enduring such horrific experiences, these soldiers have been denied the compensation they so rightly deserve from the companies that unjustly profited from the suffering of prisoners of war. Like the victims of the Holocaust who have achieved compensation from German companies for their slave labor during the Nazi occupation, it is time for World War II prisoners of war held in Japan to also attain the justice they deserve.

I look forward to hearing from our witnesses to understand how and why there could possibly be any opposition to a bill that stands on solid legal ground, is good public policy, and most importantly, is a fair and just solution to a problem that has been languishing for more than fifty years. I am specifically interested in understanding why the 1951 Peace Treaty has been interpreted to exclude claims by prisoners of war against private companies that held the prisoners for slave labor. The meaning of the Peace Treaty's text and the recent publication of communication between the Prime Minister of Japan and the Foreign Minister of the Netherlands *clearly* suggest that such claims should not be excluded. Moreover, Article 26 of the Treaty promises the United States equal advantages as those achieved by other nations on behalf of their citizens. With eleven other settlement agreements providing "greater advantages" to citizens of other countries, it is time for the United States to invoke Article 26 of the 1951 Peace Treaty to also achieve justice for our veterans. This is why I have been in full support of Congressman Honda's efforts for more than a year and continue to fully support H.R. 1198.

Once again, I wish to commend my colleagues, Congressman Honda and Congressman Rohrbacher, for working so hard to bring us this long overdue vehicle of resolution for a grave injustice suffered by thousands of our World War II veterans.

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PREPARED STATEMENT OF THE HONORABLE MICHAEL M. HONDA, A REPRESENTATIVE  
IN CONGRESS FROM THE STATE OF CALIFORNIA

Chairman Gekas, Ranking Member Jackson Lee and Members of the Immigration, Border Security and Claims subcommittee, it is a privilege for me to be here today to speak about the bill H.R. 1198 and the situation of former American P.O.W.s who fought in the Pacific Theater during World War II. My commitment in addressing these issues is deep-seated. I thank my good friend and colleague from California, Dana Rohrabacher for his tireless work on these issues as well.

I am a teacher by training—I am not an expert on the issue of war and the atrocities that all too often accompany the prosecution of war between nations.

I want to share with you why I think it is important to pay attention to events that took place over 50 years ago.

The roots of my involvement in the P.O.W. reparation movement was embedded in me as a youth, well before I had any idea about the atrocities that some Japanese companies visited upon U.S. servicemen during WW II.

My family was interned in a camp in Amache, Colorado in 1942. We were eventually able to leave the camp because my father volunteered to serve in the Navy's Military Intelligence Service.

The Japanese American Redress Movement focused the United States on coming to terms with the injustices of the internment of Japanese Americans during World War II—this shaped my desire *to set the record straight*.

It was once taboo in my community to discuss the internment issue. The Redress movement brought the reality of internment out into the open and allowed the healing process to begin—this enabled many of us to put aside our bitterness and understand clearly what happened to us in our own country during World War II.

Just as the healing process began in my community, it is my great hope that H.R. 1198 will result in a historic decision which will bring some measure of closure for our brave soldiers, sailors and airmen who were so severely mistreated as prisoners of war while educating our nation about what really happened during World War II so together, we can all learn from the lessons of those dark times. We cannot ignore the past. We cannot sweep the events of the past under the rug.

When I think about forgiveness, I think about *Dr. Lester Tenney*, an American veteran and P.O.W. who is with us today. Dr. Tenney once told me: If you can't forgive—you are still a prisoner.

Dr. Tenney's story mirrors what many of our P.O.W.s went through. He became a prisoner of war on April 9, 1942, with the fall of Bataan in the Philippines. A survivor of the Bataan Death March, he was sent in a "hell ship" to Japan, where he became part of the slave labor force working in a coalmine owned by the Mitsui company.

Dr. Tenney has stated, and I quote, "I was forced to shovel coal 12 hours a day, 28 days a month, for over two years. The reward I received for this hard labor was beatings by the civilian workers in the mine". And if he did not work fast enough or if the American troops had won an important battle, the beatings would be that much more severe.

It is important to stress that the legislation we have introduced, H.R. 1198, is by no means an instrument to further an agenda that fosters anti-Asian sentiments, racism, or Japan "bashing." *What this bill will do—is give our veterans their much deserved and long-awaited day in court, restore some measure of dignity to them, and set the record straight, before they all die. The youngest POW is about 80 years old now.*

Our intention in pushing for the Justice for United States Prisoners of War Act of 2001 is to support our former prisoners of war held in Japan during World War II and not allow our State Department to outlast the survivors.

*Private employees* of these companies tortured and physically abused our G.I.s, while the corporations withheld essential medical care and even the most minimal amounts of food.

After the War, approximately 16,000 P.O.W.s returned—all battered and nearly starved to death, many permanently disabled . . . all changed forever.

More than 11,000 P.O.W.s died at the hands of their Japanese corporate employers, making it one of the worst records of physical abuse and mortality rate of P.O.W.s in recorded history.

Now, like many other victims of World War II-era atrocities, the remaining survivors and the estates of those who have since passed away are seeking justice and historical recognition of their ordeal.

The former P.O.W.s do not seek any action or retaliation against the current Japanese government or against the Japanese people. Nor do they seek to portray Asian-Americans in any sort of negative light. Rather, they simply seek just compensation from the Japanese companies who profited from their suffering.

The main problem these former P.O.W.s face today has been the way in which the U.S. peace treaty with Japan has been interpreted by the State Department. Japan has extended more favorable peace settlement terms with other countries—and is continuing to settle war claims with nationals of other countries. Unfortunately, to date, the U.S. State Department has asserted that former P.O.W.s can claim no benefits due to the State Department's interpretation of the terms of the peace treaty, while other countries have helped their nationals in receiving benefits.

The U.S. State Department has stood in the way of our P.O.W.s' efforts to obtain some amount of justice by their restrictive reading of the peace treaty.

In the face of this of these obstacles, Congress passed a resolution, S.Con. Res. 158, in the final days of the 106th Congress, calling upon the State Department to "put forth its best efforts to facilitate discussions designed to resolve all issues between former members of the Armed Forces of the United States who were prisoners of war forced into slave labor for the benefit of Japanese companies during World War II and the private Japanese companies who profited from their slave labor."

To date, the State Department has apparently taken no significant action to resolve this matter. It is therefore up to this Congress to press this issue firmly but fairly.

Our bill is a balanced and fair response to this situation. H.R. 1198 would:

- pursue justice through the U.S. court system (as any former employee of a private employer can)
- allow states to extend the statute of limitations applicable to these claims for a period up to 10 years, and
- require that any U.S. government entity provide the Department of Veterans Affairs any medical records relating to chemical or biological tests conducted on any P.O.W. and make those available to the P.O.W. upon request.

Since the end of the World War II, the Japanese corporations that abused these former P.O.W.s and profited from their forced labor have prospered enormously.

Many of these companies are now household names in the United States. As an ethical and moral matter, they long ago should have voluntarily reached out to their victims and settled this injustice.

These men, members of what Tom Brokaw calls “the greatest generation”, volunteered for combat at the onset of WWII in the Pacific Theater. Their average age was 17, 18 years, young, strong and in the prime of their youth, full of vigor and patriotism.

These brave soldiers were left in the Philippines, ordered to surrender to the Japanese Imperial Army; forced to march the infamous 55 mile Bataan Death March, packed into the hole of the Hell Ships (standing room only) taking them to Japan as prisoners of war. While P.O.W.s the Japanese Corporations asked to use the P.O.W.s as laborers in their coal, copper mines. Permission was granted and at that point they became slave laborers, working without compensation and brutalized for months on end.

At the war's end, the U.S. sued for an unconditional surrender and to prosecute all war criminals who had committed crimes against humanity. Neither happened. Our government negotiated away an unconditional surrender with the defeated Japanese government, consciously deleting the P.O.W.s inclusion in the treaty which took until 1952 to be ratified by the Congress.

What we ask today, gentle people, is to allow these heroes who placed their youth upon the same sacrificial alter that Abraham did when he was being tested for his faith, to have their day in court to allow them to once again struggle to regain their dignity, their pride and to have a fighting chance for the apology and redress in a court of law. They survived the horrific Death March. They survived the stench and suffocating death of the Hell Ships. They survived the prison camps and the torture of slavery.

TODAY? Now, THEY are surviving our judicial system. The very system they fought to defend.

On behalf of the men of indomitable spirit and grace, I ask for your support of this important measure and urge you to facilitate its expeditious passage.

STATE DEPARTMENT DOCUMENTS SUBMITTED FOR THE RECORD  
BY REP. SHEILA JACKSON LEE

CONFIDENTIAL

CCPT

San Francisco, September 7, 1951

Dear Mr. Prime Minister,

I beg to draw the attention of Your Excellency to the paragraph in the address to President and Delegates of the Peace Conference I made yesterday, reading as follows:

"Some question has arisen as to the interpretation of the reference in article 14 (b) to 'claims of Allied Powers and their nationals', which the Allied Powers agree to waive.

It is my Government's view that article 14 (b) as a matter of correct interpretation does not involve the expropriation by each Allied Government of the private claims of its nationals so that after the Treaty comes into force these claims will be non-existent.

The question is important because some Governments, including my own, are under certain limitations of constitutional and other governing laws as to confiscating or expropriating private property of their nationals.

TO: His Excellency  
Shigeru Yoshida,  
Prime Minister of Japan.

DECLASSIFIED  
Authority 269003  
By ZJ NARA Ditz/R/No

CPA2-007644

Also, there are certain types of private claims by allied nationals, which we would assume the Japanese Government might want voluntarily to deal with in its own way as a matter of good conscience or of enlightened expediency\*.

I should highly appreciate it if Your Excellency would kindly give me your views on this matter before the end of this conference.

Please accept, Mr. Prime Minister, the assurance of my highest consideration.

Dirk U. Stikker  
Minister of Foreign Affairs of the Netherlands

By JS  
Authority

February 16, 1955

YOSHIDA-STIKKER ARRANGEMENTS FOR COMPENSATION  
FOR DUTCH CIVILIAN INTERNEES

At the time of the signing of the Peace Treaty the Japanese Prime Minister, Mr. Yoshida, and the Netherlands Foreign Minister, Mr. Stikker, exchanged letters concerning compensation for Dutch civilian internees.

The American Secretary of State in a conversation with Prime Minister Yoshida on November 9, 1954, urged early settlement by Japan of reparations and other claims matters still remaining from the Peace Treaty. Conversations related to this subject were also held between Assistant Secretary of State Walter Robertson and Foreign Minister Katene Okazaki, on October 23, 1954.

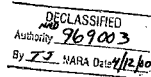
It appears that the ratification of the Peace Treaty by the Dutch Parliament was made possible only by assurances that the Yoshida-Stikker Arrangements would be implemented. It is the understanding of the Government of the United States that up to the present no definite steps have been taken to carry out the spirit and intent of the letters. Confidential reports from The Hague disclose a serious concern by the Netherlands authorities as a result of the failure to reach an early solution, and such disappointment has been generated because of this delay. There does not appear to be any basis for alleging that Japan is under a legal obligation to compensate the Dutch civilian internees. On the contrary, the exchange of letters may be considered a "Gentlemen's Agreement" contemplating a negotiation in good faith for the settlement of claims presented by the Dutch internees.

In view of the fact that the representatives of the United States Government at the San Francisco Peace Conference exerted considerable pressure on the Netherlands representatives with a view to their signing the Peace Treaty, and as one of the arrangements was assurance that the terms of the Yoshida-Stikker letters would be honored, the Government of the United States naturally feels a certain sense of responsibility in the matter.

The Embassy, therefore, wishes to express its most earnest hope that negotiation for a settlement of this problem commence at an early date.

IN CONFIDENCE

RG 59 General Records of  
the Dept of State  
Central Decimal File 1955-1959  
294.1141/9-459 thru  
294.5641/4-1955



CPA2-007676

## Office Memorandum • UNITED STATES GOVERNMENT

TO : Mr. Boardman *for*  
 FROM : **NA SUB. FILE** *P-6.4.*  
 SUBJECT: Implementation of Yoshida - Stikker Arrangements.

DATE: June 9, 1955

The attached despatch No. 1400 of May 1955 reports that the Dutch Embassy in Tokyo is satisfied with the progress of negotiations for implementation of the Yoshida - Stikker arrangements. The memorandum enclosed with the despatch mentions in paragraph 5 that Jules Bassin in February proposed to act as intermediary for the problem. I assume he has since kept out of the matter as much as possible in view of our instruction No. CA-7168 of April 19, 1955.

Although there is nothing that can be done about it, it may be a little awkward for us to explain to American civilians who were interned by the Japanese in the Far East why they should receive no compensation if the Dutch Government succeeds in getting some compensation from Japan for Dutch civilian internees. You will recall we had a lot of explaining to do to American prisoners of war about their being cut out of the Article 16 fund. We were able to remind prisoners of war that the United States Government provides compensation to them out of Japanese assets in the United States. But the United States Government has not provided any compensation to American civilians who were captured outside of the Philippines or other United States territory.

State Dept.  
 RG 59, 259/61/15/6  
 Decentral File 1955-1959  
 Sec 1217

FB:NA:CAFrleigh:prg  
 6-9-55

*Handwritten:* 1148  
 marked by H/L

DECLASSIFIED  
 Authority 767003  
 By TS NARA Date 4/12/80

CPA2-007652

Linda G. Holmes  
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Shelter Island, NY 11964  
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September 24, 2002

The Hon. George Gekas  
United States House of Representatives  
Room 2109 Rayburn House Office Building by Fax to 202-225-8440

Re: Hearing Sept. 25: HR 1198

Dear Congressman Gekas,

Thank you for co-sponsoring HR 1198, the Justice for U.S. Prisoners of War Act of 2001, and for conducting a hearing tomorrow as Chair of the House Judiciary Subcommittee on Immigration, Border Security and Claims. Please make this letter part of the hearing record.

As you and your hearing co-chair Rep. Jackson-Lee listen to the witnesses, please bear in mind that in February, 1942, the Japanese Diet passed legislation ordering Mitsui, Mitsubishi, Kawasaki, Nippon Steel and all the other Japanese companies asking for the use of white prisoners of war to pay our POWs Japanese soldier's pay, according to rank. In addition, the companies were ordered to make a "contribution" to the Japanese government of 2 yen per man per day for the use of prisoner-laborers. But the payments to our POWs were not made, although in a subsequent report to the local prefecture, Mitsui boasted that its production was going better than ever since acquiring the use of white POWs.

So Mitsui Mining Company owes Lester Tenney and nearly 900 of his fellow American veterans three years' wages, plus 60 years' interest! It's just a shame that these companies have not been willing to pay up, as German companies have done for their slave laborers -- and that


our veterans have to seek relief in court, as HR 1198 would enable them to do, at long last.

I hope that your subcommittee will recommend that HR 1198 be passed to the floor for full debate and a well-deserved passage.

I am a member of our government Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group Historical Advisory Panel, and have published two books on our Pacific POWs during WWII. I will be sending you a copy of my most recent book, *Unjust Enrichment: How Japan's Companies Built Postwar Fortunes Using American POWs*, which fully documents why these companies still owe compensation to so many of our veterans.

Again, many thanks for your attention to this one unresolved issue of the Pacific War.

Sincerely,

  
Linda Goetz Holmes

## PREPARED STATEMENT OF HAROLD G. MAIER

## I. PROFESSIONAL BIOGRAPHY AND QUALIFICATIONS

I am Harold G. Maier, Professor of Law at Vanderbilt University, Nashville, Tennessee, where I have been a member of the Law School faculty since 1965. I received my BA degree in English literature at the University of Cincinnati in 1959 and my JD degree in 1963 at the UC College of Law. I earned my LLM degree at the University of Michigan in 1964 with a concentration in international legal studies.

In 1959–60, I studied German language and history as a Luftbrücke Dankstipendiat at the Free University of Berlin, Federal Republic of Germany (FRG), and pursued advanced studies concerning the international licensing of industrial property rights at the Max Planck Institute for Patent, Trademark and Competition Law at the University of Munich (FRG) in 1964–65.

At Vanderbilt, I currently teach courses in *International Civil Litigation*, *Constitutional Law of United States Foreign Relations*, and *Conflict of Laws* and have also taught *Public International Law*, *Comparative Law*, *Civil Procedure*, *U.S. Constitutional Law*, *Patents*, *Trademarks* and *Unfair Competition and Immigration Law*, as well as seminars on various related subjects.

In 1983–84, I served as Counselor on International Law to the Legal Adviser of the United States Department of State and am presently a member of the State Department's Advisory Committee on Private International Law. I was special liaison between the Office of the Legal Adviser and the committee of Reporters for the ALI'S RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, 1984–88, and was consultant to the Office of the Assistant Secretary of the Army for the Panama Canal Treaty Negotiations, 1976–77.

I served as an expert witness for the United States government in the Cuban Mariel Boat Lift cases (see, e.g., *Fernandez-Roque v. Smith*, 622 F. Supp. 887 (N.D.Ga., 1985) and was a member of American Branch of the International Law Association's *ad hoc* Committee on International Law in Municipal Courts, report published November 16, 1993.

I have been a visiting professor at law schools at the Universities of Pennsylvania, George Washington, North Carolina and Georgia and in summer law programs in Aix-en-Provence, France, and London, England. For the academic year 2000–2001, I have been appointed *Straus Visiting Distinguished Professor of Law* at Pepperdine University Law School in Malibu, California.

I am a member of the American Society of International Law and of the American Society of Comparative Law. I served on the board of editors of the *AMERICAN JOURNAL OF INTERNATIONAL LAW* in 1984–88, and have been a member of the editorial board of the *AMERICAN JOURNAL OF COMPARATIVE LAW* since 1997.

I was elected to membership in the American Law Institute (ALI) in 1984 and served on the Committee of Consultants for the ALI's Complex Litigation Project, 1988–93. In 1975–76, I was a Guest Scholar at the Brookings Institution, Washington, D.C., studying the role of the separation of powers principle in the conduct of United States foreign policy.

## II. CONTEXT OF THIS TESTIMONY

I have been requested by United States nationals who were held as prisoners of war by the Government of Japan during the Second World War to consider the application of international and constitutional legal principles in United States courts in the context of claims filed by those nationals against certain Japanese corporations and their United States subsidiaries. I have been asked to assume that the Japanese corporate defendants used these American war prisoners as slave or forced laborers without pay, tortured them and committed other acts of gross inhumanity against them, all in violation of international and Japanese legal standards for treatment of prisoners of war.

## III. COMMENTARY ON THE LEGAL SUBSTANCE OF THESE CLAIMS.

I have been advised that both the Japanese parent juridical entities and their United States subsidiaries have invoked the 1951 San Francisco Peace Treaty between the United States and Japan (and particularly Article 14(b) of that treaty) as a defense to these actions by American citizens who were Japanese Prisoners of War held in Japan during World War II. It is my opinion that none of the terms of that Treaty precludes these legal actions by American citizens who were former prisoners of war.

There are several reasons why the 1951 Peace Treaty does not preclude these claims. First, the language of Article 14 and the publicly articulated purposes of the

Treaty indicate *only* that it intended to do more than address the limited questions of what should be done with Japanese-owned assets which in 1951 were under the control of the United States and the other Allied Powers. In this respect, the 1951 Treaty does not include terms of exclusivity of remedy with respect to all Japanese violations of individual rights of American citizens that occurred during world War II. Article 14(a)(2) of the Treaty gave the United States and its Allies only the right to seize and dispose of Japanese assets within their control. Section 14(a)(2) makes no comprehensive reference to any limitations on future remedial measures on behalf of United States nationals (for example, nothing in the Treaty addresses or purports to preclude U.S. nationals from seeking future remedies against assets or property of private Japanese nationals located in Japan).

Moreover, the mechanism selected for paying compensation (e.g., the confiscation of Japanese-owned assets *then under the control of the United States* for conversion into assets suitable for paying compensation claims to persons illegally injured by the Japanese Government) was agreed to by the Allied Powers in explicit recognition that, at that point in time, Japan could not develop a viable postwar economy if it were required to pay immediately all valid claims. This policy basis for Article 14(a)(2) excludes *any* reference, pro or con, to *future* claims filed by individuals to recover for injuries at the hands of the Government of Japan or Japanese nationals when the Japanese economy no longer needed protection from the necessary results of its inhumane wartime policies. As such, there is no evidence in the Treaty's language or purpose that the Allied Powers agreed to excuse the Government of Japan or Japanese nationals from *future* private claims to recover for these injuries.

Lacking the evidence of any clear intention to nullify the future rights of these former prisoners now seeking compensation, the public statements of the United States' negotiators at most suggest the Peace Treaty was specifically intended to address only the use of Japanese assets then located within the United States. Thus, for example, I would direct the attention of the Committee to Secretary of State Dulles' explanation of the Treaty's terms and intent before the Senate Foreign Relations Committee, in which he stated,

The United States gets, under this treaty, the right to use Japanese assets *in this country* to satisfy whatever claims Congress feels should be satisfied. We have taken under that provision approximately \$90 million of Japanese assets in this country. Approximately \$20 million have been used to take care of claims which have been approved by the Congress on behalf of internees, civilians and prisoners of war, and it remains for Congress to decide what it wants to do with *the balance*.

Nothing in this statement suggests that future claims of United States nationals were intended to be nullified by operation of the Peace Treaty, or that the United States had precluded any U.S. nationals from pursuing future claims. Secretary Dulles' comments refer only to claims to be satisfied out of Japanese assets then located within the United States and to the role of Congress in distributing the balance of *these* particular assets. This interpretation makes especially good sense in the light of the stated purpose of the United States to prevent the economic collapse of post-war Japan by restricting recovery to those assets then under United States control. It has no bearing on the continued existence of claims if and when Japan's economy might recover or if Japan demonstrated its ability to provide further compensation.

Second, the structure of the text of the Peace Treaty provided many provisions in which the United States could declare explicitly that the remedies referred to in the Treaty were exclusive (or preclusive) with respect to *all* claims brought by private U. S. citizens. As even the most cursory examination of the text of the Treaty would disclose, no such explicit limitation is contained in the Treaty. Despite this, I am advised that an assertion to the contrary has been made by the Defendant corporations (and presumably by the Government of Japan) based on Article 14(b) which, by its terms, waives:

. . . all reparations claims of the Allied Powers, [and] other claims of the Allied Powers and their nationals, arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war. . . .

Under international law and practice, this provision does not operate in the manner asserted by these Defendants. To the contrary, the most reasonable interpretation of the wording used in this provision is that the Allied Powers (including the United States) waived their respective rights *to espouse* in the future the claims of their respective nationals arising out of the prosecution of the war. Without such espousal, no claims based on private injuries *and arising under international law* exist for the Allied Powers to pursue against the Government of Japan. If this were

not the intent of the waiver, the Allied Powers—including the United States—would have put themselves in the position of waiving unespoused claims in which they had no valid, legally recognized interest. Under international law, an injured national's government has no recognized legally enforceable interest, and, therefore, no interest to “waive,” until the government espouses the injured individual's claim.

This rule has particular significance for the United States. Under domestic law, the United States government cannot waive a claim that it does not “own,”—that it has not espoused—without the consent of the owner of the claim. I am not aware of any indication that the former U.S. prisoners of war waived their claims, nor any evidence that the United States ever proposed espousal of these claims or formally espoused these claims. The fact that the former POWs have filed this law suit suggests precisely the opposite conclusion.

Third, even if the Treaty *could* be construed to preclude private claims by United States nationals against Japanese nationals, this preclusive effect would have been overtaken by operation of the Most Favored Nation provision embodied in Article 26. Under that Article, Japan has extended unconditionally to every Allied Power (including the United States) the right to claim the same treatment from the Japanese government that Japan gives other nations with respect to war claims, regardless of any limitation that might be read into the original terms of the 1951 Treaty. This most-favored-nation clause, which is commonplace in treaties, is unconditional and unqualified. It operates *automatically* to give the United States and any other Allied Powers rights of any other nation to which the Japanese government might give more favorable treatment with respect to war claims than it gave to the parties to the Peace Treaty. Under standard practice in international law, the United States need take no formal action to avail itself of such more favorable terms. Furthermore, the time at which such more favorable terms might be granted to another nation is irrelevant to the rights of the United States to claim the benefit of those terms. The United States need not enter into additional negotiations with Japan in order to claim its most-favored-nation rights. The failure of the United States or any other Treaty party to take any formal or official steps to invoke its rights under the most-favored-nation clause does not, of itself, constitute a waiver of those rights, nor does such failure create an estoppel against the assertion of such rights.

While I have not reviewed the totality of all treaties into which Japan has entered since World War II, I have reviewed at least eight in which the Japanese government has extended “more” favorable treatment to other nations than it did to the United States with respect to United States claims on behalf of its injured nationals. For example, Japan agreed in its peace treaty with Denmark to make payment for claims for injury to Danish nationals, without requiring release of claims against Japanese nationals as Japan required in the Peace Treaty with the United States. Similarly, Japan has paid claims of foreign nationals without requiring the release of claims against Japanese nationals, the *quid pro quo* that its nationals now seek to invoke through the strained interpretation of the 1951 treaty with the United States, discussed above. (See Japanese Treaties with Sweden, Switzerland, Spain, and The Netherlands.) Further, in their war claims settlement agreement, Japan agreed with Burma to reopen both the scope of waiver and the amount of payment that Japan was to make to settle claims against Japan by Burma. Japan has made no such offer to the United States. And, in its settlement with the Soviet Union, Japan agreed to limit the scope of its release of claims to those that arose after August 9, 1945. I am advised that the claims at issue in the suits brought by U.S. nationals against Japan arose before that date.

In the light of these subsequent war claims agreements on terms more favorable to foreign nationals than those extended to nationals of the United States in the Peace Treaty, Japan must now be treated as having extended that same favorable treatment to claims by United States nationals. Those terms do not include any basis to assert that claims by United States nationals against Japanese nationals have been “waived” in any respect. Thus, I reiterate that, even if the Treaty *could* be construed to preclude private claims by United States nationals against Japanese nationals, this preclusive effect would have been overtaken by operation of the Most Favored Nation provision embodied in Article 26.

#### CONCLUSION

For all these reasons, I conclude that, in accordance with international law and practice, the 1951 Treaty should not, and cannot, be interpreted to preclude private actions by U.S. nationals against private Japanese nationals, and that Article 14(b) of that Treaty does not operate to effect any contrary rule.

## PREPARED STATEMENT OF MICHAEL D. RAMSEY

I hold the position of Professor of Law at the University of San Diego Law School. I teach and write in the areas of foreign relations law, constitutional law and international law, including the law of treaties. Among other matters, I specialize in the legal aspects of international claims against foreign governments and foreign nationals. I am submitting this statement for the record in a Hearing to be held by the House Judiciary Committee scheduled for September 25, 2002, regarding the legal status of claims against the Japanese government and Japanese nationals by former U.S. prisoners of war.

I have been asked to give my opinion whether the 1951 Peace Treaty, signed in San Francisco between Japan and various allied nations including the United States (the "Treaty"), extinguishes the claims of individual U.S. prisoners of war ("POWs") against private Japanese entities (the "Japanese companies") for injuries suffered during their captivity. I assume for purposes of this opinion that in taking the actions giving rise to the POWs' claims, the relevant Japanese companies were not acting as agents of, or otherwise under the control and direction of, the government of Japan, but rather were acting independently as private businesses.

In preparation for rendering this opinion I have reviewed the pleadings and other materials filed in the *Tenney v. Mitsui & Co., Ltd.* and *Dillman v. Mitsubishi Materials Corporation* litigations, together with exhibits. I have also conducted an independent review of U.S. treaty practices, and I have examined the documents contained in the series *Foreign Relations of the United States* relating to the drafting and negotiation of the Treaty. Further, in the course of my work I am generally familiar with U.S. and international law and practice relating to treaty formation and interpretation, and to the settlement of international claims, as well as commentary upon such matters.

On the basis of the foregoing, and for the reasons set forth below, it is my opinion that the Treaty—specifically Article 14(b) of the Treaty—does not extinguish the private claims of individual U.S. citizens against private Japanese companies that did not act as agents of, or otherwise under the control and direction of, the Japanese government, even though these claims arose during the war while the U.S. citizens were POWs in Japan. **Specifically, this opinion is based upon four primary considerations: (1) the plain language of Article 14(b); (2) other portions of the Treaty; (3) historical practice; and (4) constitutional considerations.** I also consider in this opinion the drafting and negotiating history of the Treaty, the various counterarguments expressed in support of a broader reading of the Treaty, and in particular the contrary views of the U.S. State Department. I do not find any of these contrary arguments persuasive.

## THE PLAIN LANGUAGE OF THE TREATY

Under U.S. and international law, the appropriate starting place in treaty interpretation is the text of the Treaty. The relevant text of the Treaty is Article 14(b), which states:

"[T]he Allied Powers waive all reparations claims of the Allied Powers, [and] other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals *in the course of the prosecution of the war* . . ." (emphasis added).

The question is whether actions taken by private Japanese entities which were not acting as agents of, or otherwise under the control and direction of, the Japanese governments, are "actions taken by Japan and its nationals in the course of the prosecution of the war."

The phrase "in the course of the prosecution of the war" is not a term of art in international law. Accordingly it should be given its ordinary English meaning, as it would have been understood by the parties to the Treaty. The relevant dictionary definition of "to prosecute" is "to carry on". Article 14(b), then, refers to actions taken to "carry on" the war.

War, in international law, is a public act, carried on ("prosecuted") by a government through its agents. There is no such thing as a "private" war. The key element distinguishing public war from private violence is the presence of sovereign authority. Individuals not in government service do not "carry on" a war, because war is the act of the government. They may support it, or take actions that directly or indirectly assist the government in carrying it on, but they themselves do not carry it on, since war is, under international law, a quintessentially governmental act. As a result, I conclude that actions are not taken in the course of the prosecution of a war unless they are ultimately traceable to the government's direction and command. Therefore I view Article 14(b) as using the "course of the prosecution of the

war” language to distinguish between actions taken by government agents and the like, on one hand, and actions taken by purely private parties, on the other.

This definition of “war” is confirmed by both international and domestic sources. *Oppenheim’s International Law*, for example, defines war as a “contention between two or more States through their armed forces.” (H. Lauterpacht, ed., 7th edition, 1952, vol. 2, p. 202). This is the longstanding view in international law. *See, e.g.*, Emmerich de Vattel, *Droit des Gens [The Law of Nations]*, book III, Ch. I, Sec. 3 (1758) (Chitty trans. 1863) (“the sovereign power alone is possessed of authority to make war”). It is also reflected in U.S. law. “War refers to and includes only hostilities carried on by entities that constitute governments. . . .” *Pan American World Airways, Inc. v. Aetna Casualty and Surety Co.*, 505 F.2d 989, 1012 (2nd Cir. 1974) (calling this the “ancient international law definition”).<sup>1</sup>

As a result, under U.S. and international law, the phrase “prosecution of the war” can only refer to governmental actions. “Prosecution” of the war means the carrying on of the war. War is something only governments (and those authorized and directed by governments) may carry on. Consequently, the language of Article 14(b) does not extend to private claims against private Japanese companies.

This reading is confirmed by a seemingly minor but important point in the text of Article 14(b). By Article 14(b), the waiver extends only to claims based on actions taken by “Japan and Japanese nationals.” (emphasis added). Read literally, this phrase encompasses only actions attributable jointly to Japan and Japanese nationals—that is, to actions taken by a Japanese national at the direction of the government. In contrast, had the waiver been intended to cover claims unrelated to the Japanese government, it should have applied to actions taken by Japan *or* Japanese nationals. Although the conjunctive is sometimes erroneously used to mean the disjunctive, in this particular case the literal meaning is confirmed by the phrase “prosecution of the war,” which refers only to governmental activities—that is, actions taken jointly by Japan and the Japanese nationals acting on its behalf to carry on the war.

Further, in addition to the official English version of the Treaty there is an official French version which, according to the Treaty, is “equally authentic.” The French version of Article 14(b) renders “the prosecution of the war” as “la conduite de la guerre.” The relevant French dictionary definition of “conduite” is “conduct . . . ; direction; supervision.” These words refer to the activities of entities that have control over the war effort (or some part of it)—which by the international law definition of war can only be the government and its instrumentalities. While it should be clear from the English version alone that private parties do not “carry on” (“prosecute”) war, it is even clearer that they do not conduct, direct, or supervise it. The French version of the Treaty thus confirms the reading I draw from the English version.

Finally, it is clear from the language of Article 14(b) that the drafters did not intend to encompass within Article 14(b) all claims arising as a result of the war. It is a long-standing canon of interpretation that a text should be read to give meaning to all of the words and phrases it uses, without rendering any of them superfluous. Had the treatymakers intended to include all wartime claims within Article 14(b), they could have simply written that its waiver extends to all claims arising “in the course of the war.” The actual language states that the waiver extends to claims arising “in the course of the prosecution of the war.” The additional language should not be read as superfluous, but should be read as limiting the categories of claims to which the waiver extends. Thus it is appropriate as an interpretive matter to focus closely upon the meaning of the phrase “prosecution of the war.”

I therefore conclude that the plain language of the Treaty does not waive claims (including POW claims) arising from the actions of private Japanese entities. True, the POWs were seized by the Japanese government in the course of its prosecution of the war. But once the POWs were interned, an action by a private party affecting a person who happened to be a POW is not an “action taken . . . in the course of the prosecution of the war” because the private party does not “prosecute” (carry on) the war. The companies’ independent treatment of the POWs occurred in the course of the prosecution of the companies’ business, not in the course of the prosecution of the war.

<sup>1</sup> In this case, the court held that acts of hijacking were not part of a “war” because the hijackers were not acting on behalf of any sovereign government. *Id.* at 1012–13. Compare *Vanderbilt v. Travellers’ Insurance Co.*, 184 N.Y.S. 54 (Sup. Ct. N.Y. 1920), *aff’d* 235 N.Y. 514 (1923) (mem.) (loss due to “war” where because ship “sunk in accordance with the instructions of a sovereign government, by the naval forces of that government”) (distinguished in *Aetna*, 505 F.2d at 1012).

## EVIDENCE FROM OTHER PARTS OF THE TREATY

The conclusion that Article 14(b) does not extinguish wartime claims against private Japanese nationals is confirmed by Article 19 of the Treaty. It is appropriate to read the text of a treaty as a whole, particularly where two articles discuss related topics. Article 19, like Article 14(b), discusses waivers of wartime claims. However, the language, while similar, is distinct, and Article 19 uses language which plainly encompasses a broader range of wartime claims.

In Article 19(a), Japan “waives all claims of Japan and its nationals against the Allied Powers and their nationals arising out of the war.” While it is not obvious exactly what this phrase encompasses, it must be broader than a waiver of claims “arising out of actions taken . . . in the course of the prosecution of the war” (the Article 14(b) language), or else the phrase “of actions taken . . . in the course of the prosecution” would be superfluous. In addition, in Article 19(c), Japan waives “all claims (including debts) against Germany and German nationals on behalf of the Japanese government and Japanese nationals . . . for loss or damage sustained during the war.” This language seems to cover all wartime claims, and had the parties to the Treaty intended to cover all wartime claims in Article 14(b) as well, they would have used the same language. In short, the Treaty uses three different ways of expressing waiver of claims:

- (i) claims “for loss or damage sustained during wartime”;
- (ii) claims “arising out of the war”; and
- (iii) claims “arising out of actions taken in the course of the prosecution of the war”.

Since each waiver is worded differently, each should be give a distinct scope. The only way to do this is to read “prosecution of the war” narrowly to include something less than all wartime claims, so that it does not swallow the other two categories.

One might object that, since POWs were seized by the Japanese government in the course of its prosecution of the war, all claims by them (including for private acts) arise in the course of the prosecution of the war. In my view this interpretation is incorrect on its face, for the reasons stated above: even if the POWs are held in Japan in the course of the prosecution of the war, that does not mean that actions taken by a private party that affect them are taken in the course of the prosecution of the war. The Treaty language specifically refers to “actions taken” in the course of prosecution of the war, and, as discussed, private parties do not prosecute wars and therefore actions taken by them are not “actions taken in the course of the prosecution of the war.” But in any event, the contrary interpretation is foreclosed by comparison with Article 19 of the Treaty. Article 19(b) specifically states that POW claims are included within the Article 19(a) waiver.<sup>2</sup> This shows that the treaty’s drafters were concerned that Article 19(a)’s waiver was ambiguous as to whether it waived all POW claims (since the drafters felt the need to clarify it). No such clarifying language appears in Article 14(b). As discussed, Article 19(a)’s waiver is broader than Article 14(b)’s waiver (“arising out of the war” versus “arising out of actions taken . . . in the course of the prosecution of the war”). Since the parties did not state that the Article 14(b) waiver covered all POW claims, even though Article 14(b)’s waiver was narrower than Article 19(a)’s, they must have understood that Article 14(b) did not cover all POW claims.

## EVIDENCE OF HISTORICAL PRACTICE

In my opinion the foregoing analysis demonstrates that Article 14(b) unambiguously does not waive claims for actions taken by private Japanese entities. At minimum, one cannot conclude that Article 14(b) unambiguously waives the private-party-against-private party claims, for the prior discussion identifies at least one meaning of “in the course of the prosecution of the war” (and thus of Article 14(b) as a whole) that is consistent with non-waiver of these private claims. If Article 14(b) is thought to be ambiguous, it is appropriate under the U.S. and international law of treaties to consult extrinsic evidence of its meaning. As set forth below, key extrinsic sources confirm the reading of Article 14(b) described in this opinion, and

<sup>2</sup>Article 19 states:

- (a) Japan waives all claims of Japan and its nationals against the Allied Powers and their nationals arising out of the war. . . .
- (b) The foregoing waiver includes . . . any claims and debts arising in respect to Japanese prisoners of war and civilian internees in the hands of the Allied Powers. . . .

provide some explanation of why the Treaty's drafters selected a less-than-comprehensive waiver in Article 14(b).

A treaty should be interpreted in accordance with its context, and the most important context is existing U.S. and international custom and practice. In case of ambiguity, a treaty should be interpreted to conform to, not to depart from, the relevant custom and practice. As set forth below, it is not customary under either U.S. or international law or practice for governments to negotiate and settle purely private claims of their nationals (that is, claims against foreign citizens who were not agents of, or otherwise controlled or directed by, the foreign government when the claim arose).

With respect to U.S. practice, it is common for the U.S. government to settle claims of private citizens against foreign governments and their agents and instrumentalities. *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Pink*, 315 U.S. 203 (1942); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Ozanic v. United States*, 188 F.2d 228 (2nd Cir. 1951).<sup>3</sup> However, I am not aware of any treaty prior to 1951 that purports to settle the claims of U.S. citizens against private foreign nationals, nor any case that suggests such a practice.<sup>4</sup> No such case or treaty has been cited in the course of the debate over the Treaty, and I have found none in my own independent research into U.S. treaty practices.

Since a waiver of the claims of U.S. nationals against purely private entities in the 1951 Treaty would have been unprecedented in U.S. practice, if that was what had been intended one would expect discussion of this matter among U.S. drafters and negotiators. However, I have not found any discussion in the drafting and negotiating history that unambiguously refers to a waiver of purely private claims of U.S. nationals. Rather, the references are typically to a waiver of "reparations" or of "claims against Japan," each of which, given its ordinary meaning in international law, refers only to claims against the Japanese government and its agents. Absent a strong indication of an intent to depart from U.S. practice, any ambiguity in the Treaty should be resolved to accord with that practice.

With respect to international practice, there is a recognized right of "espousal" by which a government may take over and press (or settle) the claims of its citizens against another government. But the international custom of espousal does not extend to claims against purely private parties. U.S. State Department Deputy Legal Adviser Ronald Bettauer made this point recently in discussing claims against private German companies arising out of the Holocaust: "Under international law, a government may espouse the claims of its nationals against another government," he said, but "customary international law . . . d[oes] not speak to the espousal and settlement of claims against private entities such as foreign companies." Ronald Bettauer, Keynote Address: The Role of the United States Government in Recent Holocaust Claims Resolution, Stefan A. Riesenfeld Symposium, University of California Berkeley Law School, March 8, 2001.<sup>5</sup> Therefore, it is very unusual for a treaty to address claims against private entities, because ordinarily governments do not play a role in pressing these claims.

The only treaties of which I am aware that do appear to address private claims are a series of treaties immediately following World War II in which the United States compelled various defeated Axis powers to waive claims against Germany and German citizens. Article 19(c) of the Japanese peace treaty is an example, as are treaties with Romania, Bulgaria, Hungary and Italy.<sup>6</sup> The existence of these treaties does not suggest a similar reading of Article 14(b) of the Treaty, for two reasons. First, these provisions are highly unusual, and appear to be part of a concerted U.S. effort to protect Germany and German nationals against claims of other Axis powers. They do not have a counterpart in other U.S. treaty practice, and in particular they do not involve the extinguishment of the private claims of U.S. citizens. Second, when the United States wished to extinguish private claims in its treaties, it did so clearly and in unmistakable language. Article 19(c) of the Japanese Treaty, for example, refers to all claims "arising during the war." Language in the other post-war treaties is parallel. Had such a waiver been intended in Article 14(b), the drafters would have used the same language they used in Article 19 and in the other post-war treaties. They did not, and it is contrary to the law of

<sup>3</sup>For a discussion of these cases see Michael D. Ramsey, Executive Agreements and the (Non)Treaty Power, 77 N. Car. L. Rev. 133 (1998).

<sup>4</sup>In *Dames & Moore*, for example, the Court referred to the settlement power as the "sovereign authority to settle the claims of its [the U.S.'s] nationals against foreign countries."

<sup>5</sup>This address is reprinted at 20 Berkeley Journal of International Law 1 (2002).

<sup>6</sup>Article 19(c) states that "the Japanese government also renounces all claims (including debts) against Germany and German nationals on behalf of the Japanese Government and Japanese nationals . . . for loss or damage sustained during the war. . . ." The other four treaties are similar.

treaty interpretation to give an ambiguous treaty text a meaning that is not customary in international law and which elsewhere has been accomplished only with very clear language.

#### CONSTITUTIONAL CONSIDERATIONS

An independent reasons for construing Article 14(b) not to extend to claims of U.S. citizens against private foreign entities arises from the U.S. Constitution. Ambiguous treaty language should not be interpreted to reach an unconstitutional result, or to raise serious constitutional questions. If Article 14(b) were interpreted to waive private claims, it would raise serious constitutional questions under the Fifth Amendment's just compensation clause. Therefore, that interpretation should not be adopted when another is available. See *Jones v. United States*, 120 S.Ct. 1904 (2000), and cases cited therein.

Serious constitutional questions would arise if Article 14(b) is read to waive private claims, because this would appear to be an uncompensated taking of private property in violation of the Fifth Amendment. Private legal claims are property protected by the Fifth Amendment. In *re Air Crash in Bali, Indonesia*, 684 F.2d 1301 (9th Cir. 1982) ("There is no question that claims for compensation are property interests that cannot be taken for public use without compensation."). Although the POWs may have received some compensation for their claims against the Japanese government, my understanding is that they did not receive any compensation for claims against purely private Japanese parties. Thus, if Article 14(b) is read to waive private claims, that would appear to take private property without just compensation, contrary to the Fifth Amendment. If the treaty language is ambiguous, it should be construed to avoid this result.<sup>7</sup>

#### COUNTERARGUMENTS

I have reviewed the arguments raised in various fora in favor of interpreting Article 14(b) to waive claims by U.S. nationals against purely private entities, and I find none of them consistent with U.S. and international rules of treaty interpretation. In the first instance, it is said that the phrase "actions taken . . . in the course of the prosecution of the war" unambiguously includes actions taken by purely private parties that had some ultimate benefit to the war effort. In my opinion this is an untenable reading of the phrase. At minimum, that phrase is ambiguous as to whether it covers the actions of purely private parties. As shown above, it *could* be read to cover only the actions of the government and those acting on its behalf. Indeed, I believe that is the only possible reading that is consistent with the international law understanding that only governments carry on war.<sup>8</sup>

Second, it is argued that the purpose of the Treaty was to give Japan, and Japanese industry, respite from wartime claims in order that Japan might act as a strong U.S. ally in the Cold War. After reviewing the relevant sections of "Foreign Affairs of the United States" and other matters included as exhibits to various litigation documents, I believe this may well be a correct general statement of the Treaty's purpose. However, under U.S. and international rules of treaty interpretation, this is not a ground for giving Article 14(b) a broader scope than its language will bear.

I have reviewed the drafting and negotiating history of the 1951 Treaty, and found very little that directly bears upon the waiver or non-waiver of private claims. Almost all of these materials refer to claims against the government, or against individuals acting at the direction of the government. Nothing I have seen in the drafting and negotiating history of the Treaty specifically addresses whether claims by U.S. nationals against purely private entities should be waived. This is further

<sup>7</sup>In contrast, courts have held that settlement of the claims of U.S. nationals against foreign governments and their entities may not be an uncompensated taking in violation of the Fifth Amendment, because of the unique considerations involved in claims against sovereign entities. *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237 (1983) (per Kozinski, J.), *aff'd*, 765 F.2d 159 (Fed. Cir. 1985). See also *Marks v. United States*, 15 Cl. Ct. 609 (1988). Thus a reading of the Article 14(b) waiver restricting it to claims against Japan and its agents would not raise the same degree of constitutional difficulty.

<sup>8</sup>A common textual counterargument appears to be that reading Article 14(b) to cover only actions taken by or on behalf of the Japanese government is impermissible because it ignores the phrase "and Japanese nationals." This is simply incorrect. The waiver relates, in my view, to claims arising from actions taken by Japanese nationals at the direction of the Japanese government. Such claims could be made against the government, or against the individuals who took the action in question. The phrasing of Article 14(b) ("Japan and its nationals") shows that both types of claims were included, not merely actions against the government directly. However, this says nothing about claims against Japanese nationals who were not acting at the direction of the government.

reason to construe the Treaty not to reach claims against purely private entities. In the absence of discussion, one may assume the drafters followed ordinary U.S. and international practice not to include claims against purely private parties in the waiver. Because such a waiver would have been contrary to U.S. and international law and practice, and would at minimum have raised serious constitutional questions, it likely was not within the thinking of the drafters and negotiators as they prepared the Treaty, and thus was not discussed by them.<sup>9</sup>

I am not aware of any specific evidence from the drafting history that supports a contrary view of the Treaty. The counterargument from the drafting and negotiating history is rather an appeal to a perceived generalized purpose. But under U.S. and international rules of treaty interpretation, a treaty should be interpreted on the basis of generalized purpose only where the language is hopelessly ambiguous and the usual methods of resolving ambiguity prove unavailing. As demonstrated above, this is not the case with Article 14(b). The plain language of Article 14(b) applies only to actions taken by those “prosecuting” the war, which include only actions taken on behalf of the government. Even if the language standing alone is thought ambiguous, ordinary methods of resolving ambiguity, such as investigation of custom and practice, and avoidance of constitutional difficulties, point strongly against interpreting Article 14(b) to waive private claims. Other usual methods of resolving ambiguity, such as review of the drafting and negotiating history, show no specific intent to waive private claims. In such circumstances, it is not appropriate to resort to the supposed general purposes of the Treaty to insert provisions that do not appear in the text. It is not the interpreter’s job to create the best treaty to accomplish the drafters’ supposed purposes, but rather to apply the treaty as the drafters actually wrote it.

In any event, one may speculate as to various reasons that the drafters did not include private claims in the Article 14(b) waiver. They may have felt constrained by the customary and constitutional concerns mentioned earlier. They may not have thought the private claims were significant, or they may have thought that private claims could never realistically be pursued for jurisdictional reasons (few Japanese companies then had a presence in the United

States). They may have thought, notwithstanding their desire to see Japan’s economy revived, that leaving the private claims intact while essentially abandoning government-to-government reparations was a fair balance of the horrors of the war and the realities of the post-war strategic situation. Any conclusions as to general purposes, unsupported by actual language in the treaty or specific references in the negotiating history, are essentially speculation. This is why the rules of treaty interpretation accord them little if any weight. They should not be used in this case to override the strong evidence of text and context.

#### VIEW OF THE STATE DEPARTMENT

I am familiar with the views of the U.S. State Department with respect to the proper interpretation of the Treaty. They do not alter my view of the Treaty. First, they do not follow accepted methods of treaty interpretation. Among other matters, the Department purports to rely on the plain language of the treaty, but it does not offer a reading of “actions taken . . . in the course of the prosecution of the war” that is any different from “actions taken . . . in the course of the war,” thus violating the rule that language should not be made superfluous. Further, the Department does not read Article 14(b) in connection with the broader waiver language of article 19(a) and (c), violating the rule that a treaty is to be read as a whole. Finally, the Department principally relies on the drafting history and context of the treaty to establish a general goal that Japan be protected from wartime claims. Nothing in this history specifically addresses claims against purely private entities, nor does the treaty language appear to affect such claims. But the Department would nonetheless read the Treaty to waive claims against purely private entities

<sup>9</sup>There is, moreover, one piece of drafting history that is highly relevant and supportive of a narrow reading of the Article 14(b) waiver. Article 14(b) (the waiver of claims by the Allied Powers) and Article 19(a) (the waiver of claims by Japan) were drafted using parallel language. Both waived claims for actions taken “in the course of the prosecution of the war” and stated that this included “claims arising from the treatment accorded . . . to prisoners of war and civilian internees.” The drafters subsequently changed the scope of the waiver in Article 19(a) to make it broader (substituting “arising out of the war” or “in the course of the prosecution of the war”), and they eliminated the reference to POW claims in Article 14(b), while retaining it in Article 19. The only explanation I can see is that they thought some POW claims of Allied nationals should not be waived. They obviously did not think that Article 14(b) clearly covered all POW claims, because they left the reference to POW claims in Article 19, even though Article 19 was worded more broadly. This confirms the view stated above, that the drafters deliberately wrote Article 14(b) not to include POW claims.

in order to give full effect to the supposed general goals of the drafters. As discussed, this approach is an improper use of drafting history and context, because it employs a “teleological” approach to interpretation (that is, it interprets the treaty in terms of speculation about the treaty’s general goals, instead of pursuing an interpretation tied to the actual language of the treaty).

Second, the statements of the State Department with respect to the historical and constitutional precedents for the Treaty are incorrect, and conflict with views expressed by the State Department’s Deputy Legal Adviser, Ronald Bettauer, on the related subject of settlement of Holocaust claims. Contrary to the statements of the Department, there is no constitutional or international precedent for the U.S. government to settle claims of private U.S. citizens against private foreign nationals, and in a different context the Department’s Deputy Legal Adviser admitted as much.

In its interpretation of the Treaty, the State Department has taken the position that there is ample precedent for the U.S. government espousing and settling private claims against private foreign citizens. In Mr. Bettauer’s prior Senate testimony on the matter, for example, he treated espousal of private claims against foreign governments and espousal of private claims against foreign private citizens as essentially the same issue. In arguing for the espousal authority of the U.S. government, he pointed to a long history of espousal of private claims. For example, he said: “There are many cases, including *Belmont*, *Pink*, [and] *Dames & Moore*, which have upheld the espousal power of the United States to take up the claims of [its] citizens and to settle them. . . .” As several Senators pointed out, each of these cases involved private claims against foreign governments (the USSR, in the first two cases, and Iran in *Dames & Moore*).<sup>10</sup> But Mr. Bettauer, in response to questions, did not acknowledge a distinction between espousal of “private-against-government” claims and espousal of “private-against-private” claims, and continued to cite the private-against-government cases as precedent for espousal of private-against-private claims.

Speaking in a different context, however, Mr. Bettauer has acknowledged the difference between “private-against-government” claims and “private-against-private” claims, and agreed that there is no precedent to espousing and settling the latter. In his keynote address at the Stefan A. Riesenfeld Symposium, mentioned earlier, Mr. Bettauer discussed the U.S. government’s involvement in the settlement of private claims arising out of the Holocaust. He began by noting a long history in support of government settlement of claims against another government: “Let me start by pointing out that for two centuries the U.S. government has concluded settlement agreements on behalf of its nationals. . . . Under international law, a government may espouse the claim of its nationals *against another government* if the claim was owned by one of its nationals at the time it arose and continuously thereafter until it is espoused, *if the claim involves a breach attributable to the foreign government of an international obligation*. . . .” (emphasis added). In contrast, Mr. Bettauer said, the Holocaust settlement involved claims against private entities, and thus involved an unprecedented government role: “customary international law of state responsibility and diplomatic protection would only cover claims of persons who were nationals of the espousing government at the time they arose, and *did not speak to the espousal and settlement of claims against private entities such as foreign companies*” (emphasis added).

In sum, in his Senate testimony Mr. Bettauer argued that reading the Treaty to settle “private-against-private” claims is consistent with the customary practices of nations in settling claims, but this statement is contradicted by Mr. Bettauer’s Riesenfeld talk. As he makes clear there, settling claims by nationals *against foreign governments and their agents* is a customary practice. But as he also makes clear, *settling claims by nationals against purely private entities is not part of ordinary international custom and practice*. Thus, the broad reading of the Treaty, proposed by Mr. Bettauer in his Senate testimony, is not in keeping with international practice, as he himself acknowledged in the Riesenfeld talk.

A similar problem pervades the State Department’s view of the constitutional issues. In his Senate testimony, Mr. Bettauer argued that there is longstanding constitutional precedent for settling international claims under U.S. law, again citing primarily the *Pink*, *Belmont* and *Dames & Moore* cases. As he said, “I would suggest that it [the uncompensated settlement of private international claims] has been upheld many times. . . . There’s a good review of the previous authorities by the Supreme Court in *Dames & Moore v. Reagan* [sic: actually *Regan*]”. When pressed by Senators, Mr. Bettauer refused to acknowledge any difference between the settle-

<sup>10</sup> *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

ment of “private-against-government” claims (at issue in *Dames & Moore* and related cases) and settlement of “private-against-private” claims.

In his Riesenfeld remarks, however, Mr. Bettauer acknowledged that *Dames & Moore* and related cases are *not* constitutional precedent for the settlement of “private-against-private” claims. In discussing the German Foundation negotiations, as mentioned above, he observed that international law does not have a custom of governments settling private-against-private claims. He then further acknowledged that “there was no precedent in U.S. law for the settlement of claims of nationals against foreign private entities by executive agreement” and thus that such settlements “could be subject to serious challenge”. But the cases the State Department has relied upon to interpret Article 14(b) of the Treaty—*Pink, Belmont*, and *Dames & Moore*—all involved settlements by executive agreement, as did all of the practice referred to in *Dames & Moore*. Thus, as Mr. Bettauer well knows, there is plenty of authority for the settlement of *some types* of international claims by executive agreement. However, all of these cases and practices involved settlement of “private-against-government” claims, *not* “private-against-private” claims. As a result, when Mr. Bettauer said that as a constitutional matter there is “no precedent” for settlement of claims against private entities, he was expressly recognizing the constitutional significance of the difference between private-against-government claims and private-against-private claims. In other words, Mr. Bettauer said in his Riesenfeld talk that, although there is constitutional authority for settling private-against-government claims, that is not sufficient to establish the constitutionality of settling private-against-private claims. This is exactly contrary to the position the State Department has taken in its interpretation of the Treaty.

On this point, I agree with the observations made by Mr. Bettauer at the Riesenfeld symposium. Prior settlements of claims against foreign governments are not precedents, under either constitutional or international law, for settlements of claims against private foreign companies. The State Department’s interpretation of Article 14(b) of the Treaty depends upon there being precedents for settlement of claims against private foreign companies. Yet as Mr. Bettauer himself has said, there are no such precedents. This is further evidence that the State Department’s view of the Treaty is not the correct one.

#### CONCLUSION

In my opinion Article 14(b) of the Treaty does not extinguish claims based on the actions of private entities (including claims made by POWs in wartime) because these are not “actions taken . . . in the course of the prosecution of the war.” That is so primarily because war is an act of the government, and thus governmental actors, and not private entities, “prosecute” it. If there is any ambiguity on this point, it is resolved by U.S. and international treaty practice (which does not include government-to-government settlement of purely private claims) and by U.S. constitutional considerations (which require the Treaty to be construed to avoid serious constitutional questions under the Fifth Amendment). There is simply no precedent of government-to-government settlement of claims against private foreign nationals, and the Treaty should be interpreted to accord with U.S. and international custom and practice. The drafting and negotiating history of the Treaty is not to the contrary, because it does not contain any specific references to waiver of “private-against-private” claims, and any conclusions about how the general purposes of the Treaty affected the resolution of this particular issue would be mere speculation. Accordingly, I conclude that under the U.S. and international law of treaty interpretation, Article 14(b) should not be construed to waive claims based on actions of private entities which were not agents of, or otherwise under the control and direction of, the Japanese government.

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#### PREPARED STATEMENT OF JOHN ROGERS

1. I am the Lewis Professor of Law at the University of Kentucky College of Law, I have taught public international law regularly since 1979 and U.S. constitutional law since 1992. I have also taught international law as a Fulbright Professor for a year at the Foreign Affairs College in Beijing, China, as a Fulbright Professor for a year at Zhongshan University in Guangzhou, China, and as visiting professor at the University of San Diego Law School. My research scholarship has focused to a large extent on the relation between domestic and international legal systems. I recently published a book describing and justifying the accepted, albeit limited, role of public international law in U.S. law. Before becoming a professor, I engaged in appellate litigation practice for the Civil Division of the United States Department

of Justice for four years. Later, as Visiting Professor at the Department of Justice in 1983–85, I represented the Department of State, the Immigration and Naturalization Service, the Defense Department, the Treasury Department, the Federal Reserve Board, and other federal agencies in a number of federal courts appeals involving foreign affairs and international law.

2. I have been requested by counsel for United States nationals who were held by the Government of Japan during the Second World War as Prisoners of War to consider the application of international legal principles in the context of the pursuit by those nationals of certain claims. In particular, I am advised that these nationals are pursuing claims in the state and federal courts of the United States against entities organized under the laws of Japan which, during the Second World War, directly employed these Prisoners of War as laborers, allegedly failed to pay them wages required under international and Japanese law, and allegedly tortured them or committed acts of gross inhumanity, all in violation of international and Japanese law standards. In addition, I am advised that California law allows such actions to be pursued against subsidiaries of these entities operating in the United States and that such subsidiaries are also defendants in the pending litigation.

3. I have been advised that the defendants have invoked the terms of the 1951 Treaty of Peace with Japan (and particularly Article 14(b) of that Treaty) as a defense to these actions. After review of the Treaty and materials available from public sources, as well as the memoranda regarding Article 14 submitted in these cases, I have reached an opinion that Article 14(b) does not preclude actions brought by United States nationals in United States courts under domestic (i.e., Japanese or United States) law.

4. The plain meaning of the language of Article 14(b) of the Treaty of Peace with Japan in which “the Allied Powers waive . . . *claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war*” is that it extends only to international claims in respect of nationals. Such claims are well understood to be governed by the international legal system even though they arise by virtue of harms to individuals. States of nationality of the victim have complete control over such claims, and may settle them over the objections of the victims. The Peace Treaty’s use of the word “waive” indicates unmistakably that such international claims are contemplated. Domestic law claims, in contrast, are subject to national or local law, even though international matters may be involved. A private individual’s claim under domestic law cannot be “waived” by the state, because it is not the state’s claim under the domestic legal system.

5. A clear understanding of the distinction between international law claims and domestic law claims makes the above conclusion inescapable. The two different types of claims arise under different law, with different fora, different enforcement mechanisms, and usually with different parties. An international claim in its purest form is a claim between nation-states. The Statute of the International Court of Justice reflects this by providing that only states may be parties before the Court. I.C.J.Stat. art. 34(1). The body of law that applies to an international claim is found in international treaty and custom, and not generally from the tort or contract law of particular states, which may after all be different. International claims are typically resolved by diplomacy, but may be subject to international arbitration, or even submitted to international courts like the International Court of Justice. The law applied in such fora is treaty law and customary international law, and not the domestic law of the states parties. (E.g., I.C.J. STAT. Art. 38(1); General Claims Convention (Mexico-U.S.), Sept-8, 1923, art. II, *reprinted* in 4 U.N. REPTS. OF INTL. ARB., AWARDS 11, 12.) Enforcement of such claims proceeds the way any treaty obligation is enforced. That is, states presumably obtain advantage from being seen as complying with international obligations, and therefore make good on international claims accepted as valid within the international legal system.

6. An international claim can be an “individual” claim in the sense that State A owes State B an obligation not to mistreat a national of state B in a certain way. This occurs also when State A fails to give the national of State B the protection that international law requires. For instance, Iran violated the international law rights (under treaty law and customary international law) of the United States by not protecting individual U.S. diplomats from mobs (see Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 31–33), and the United States in 1891 violated the international law rights of Italy by permitting a mob to lynch Italians in New Orleans (see *Lynching of Italians at New Orleans and Elsewhere*, 6 J. B. MOORE, DIGEST OF INTERNATIONAL LAW §1026, at 837 (1906)). In these situations the harm to an individual violated an international obligation defined by international treaty and international customary law. The claim is an individual one in the sense that harm to an individual is the

basis for the claim, and the individual often must have exhausted local remedies before the international claim may be upheld. And when a claim is paid to the claiming state, it is normally turned over by that state to the injured individual. But in concept the international claim is one brought by, and under the control of, the state of nationality of the individual victim. A state may settle or waive such claims since it is the party making the claim, and need not get the approval of the individual victim. See 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1216 (1963).

7. In contrast, a domestic law claim is brought under domestic (i.e., national or local) law, such as common law contract or tort law, or statutory antitrust or employment discrimination law. The parties are typically private individuals and corporations (but may include states and government agencies, to the extent that they have personality within the domestic legal system). The forum is generally a court or adjudicative agency of the nation's government or its subdivisions. The enforcement mechanism is the executive arm of the government, which insures that judgments are enforced. Of course the government can affect the rights and obligations of parties to domestic law claims, for instance by legislating to change the law applicable to such a claim. But such a change of rights or obligations would only in the most puzzling fashion be called a "waiver." The government may not waive the claim of its national under domestic law, since it does not represent that individual nor does it own the claim in any sense even remotely like it owns individual claims under international law.

8. The law of one system may refer to, and sometimes even incorporate, the law of the other. A treaty may, for instance, refer to the domestic law of the parties. In the other direction, a statute may refer to, or incorporate, treaty language. My recent book is largely a survey of the various ways in which domestic law refers to international law. INTERNATIONAL LAW AND UNITED STATES LAW, Ashgate Press, 1999 (hereinafter "IL&USL"). But international claims remain something very distinct from domestic law claims. Under domestic law, for instance, the Constitution is interpreted by the Supreme Court is the highest domestic law of the United States, regardless of what any treaty says. See *Reid v. Covert*, 354 U.S. 1, 15–19 (1957) (plurality opinion). Under international law, in contrast, a valid treaty is higher than anything in the U.S. Constitution. See Vienna Convention on the Law of Treaties, art. 27, 1155 U.N.T.S. 331.

9. It is also true that one action may result in both an international claim and a domestic law claim. The categories actually overlap in this sense, but an international claim is often not sufficient to raise a domestic law claim, and a domestic law claim is often not sufficient to be an international law claim. For instance, an attack on a diplomat—not prevented by local authorities—could give rise to a tort claim for battery by the diplomat against the attacker under California law, and to an international law claim by the sending state against the United States. But many tort and contract claims, even against foreign nationals, and even against foreign states, are not sufficient for the United States to raise an international law claim. Indeed, the United States generally refrains from raising contract claims at the international level, unless there has been something like a state refusal to provide a fair forum. 8 M. WHITEMAN, DIGEST OF UNITED STATES PRACTICE INTERNATIONAL LAW 906 (1963); 1975 DIGEST OF UNITED STATES PRACTICE INTERNATIONAL LAW 485. And many international claims do not raise the possibility of a domestic law claim. For instance, if the United States were to pass legislation permitting violation of a binding UN Security Council resolution embargoing some rogue regime, no claim would lie under U.S. law against an individual selling goods in violation of the embargo, even though a valid international claim could presumably be brought against the United States (see *Diggs v. Shultz*, 470 F.2d 461 (D.C. Cir. 1972)).

10. The overlap is in a very rough way analogous to the overlap of tort law and criminal law within the United States domestic legal system. Tort law and criminal law are different bodies of law, with generally different purposes and different parties. Mere negligence resulting in injury maybe tortious but criminal. And driving recklessly without hurting anyone may be criminal but not tortious. But careless driving may in some cases be both a crime and a tort. It does not follow, though, that the tort claim can be waived by the criminal prosecutor. The government is the party in interest bringing a criminal case, it brings the case in the interest of the public, even though the victim is an individual. The government can settle criminal claims, even over the objection of the victim, in the greater interest of the general public. It can be said to "waive" future prosecution. But the government is not the party in interest in a civil tort suit, and it would be a puzzling use of words for a government prosecutor to "waive" future tort litigation brought by the victim. Until the O.J. Simpson case, many non-lawyers may not have clearly understood the

way in which resolution of a criminal case does not control resolution of a civil case. But the difference was always there. Similarly, many lawyers misapprehend the clear difference between an international law claim and a domestic law claim, but the difference is still there.

11. As pointed out in paragraph 7, a government may of course change domestic law, and thereby change the content of domestic law rights and duties. Typically this is done by legislation, but in the United States it can also be done by self-executing treaty provision (President plus  $\frac{2}{3}$  Senate approval), by congressionally approved executive agreement (President with statutory authorization), and (in a limited category of cases) by executive agreement without explicit congressional authorization (see *United States v. Pink*, 315 U.S. 203 (1942)). For instance, the self-executing treaty provision at issue in the famous case of *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), changed the domestic law rights of private parties contesting the ownership of real property in Virginia. See *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813). And the executive agreement upheld in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), changed the domestic law rights of private contractors raising domestic law contract claims against instrumentalities of the Iranian government.

12. Article 14(b) of the Treaty of Peace with Japan by its plain terms contemplates resolution of international law claims against Japan. This is because of the use of the word "waive." The United States can waive individual claims under international law, because such claims are claims of the United States in important and legally relevant ways. It would make no sense for the United States government to "waive" claims of individuals under domestic law. In order to extinguish (or even to affect) domestic law claims, some different language would be required. "Waive" means give up, relinquish, or surrender. To extinguish domestic law claims, in contrast, one would expect language like "extinguish," "suspend," "invalidate," "nullify," or the like. Thus, the executive agreement upheld in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), provided that the United States was obligated

"to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.

453 U.S. at 665, quoting directly from the executive agreement. Or instead of prohibiting domestic litigation, a self-executing treaty might directly change domestic law obligations. For instance, the following treaty provisions changed what otherwise would have been the domestic law rights or obligations of private parties in the United States courts:

'The citizens [of the Parties] shall have liberty to . . . carry on trade . . . upon the same terms as native citizens or subjects.' (*Asakura v. City of Seattle*, 265 U.S. 332, 340 (1924).)

A national of the other state 'shall be allowed a term of three years in which to sell [certain inherited real] property . . . and withdraw the proceeds . . . free from any discriminatory taxation. (*Clark v. Allen*, 331 U.S. 503, 507-508 (1947).)

'in case real estate situated within the territories of one of the contracting parties should fall to a citizen of the other party, who, on account of his being an alien, could not be permitted to hold such property in the State . . . in which it may be situated, there shall be accorded to the said heir, or other successor, such term as the laws of the State . . . will permit to sell such property, he shall be at liberty at all times to withdraw and export the proceeds thereof without difficulty . . . ' (*Hanenstein v. Lynham*, 100 U.S. 483, 486-490 (1879).)

'no higher or other duties, charges, or taxes of any kind, shall be levied' by one country on removal of property therefrom by citizens of the other country 'than are or shall be payable in each State, upon the same, when removed by a citizen or subject of such state respectively'. (*Nielson v. Johnson*, 279 U.S. 47, 50 (1929).)

Article 14(b) of the Treaty of Peace with Japan contains no such language. The article simply does not refer in any plain way to domestic law rights, obligations, or claims. Instead, it waives claims of the United States government, including both claims by the nation as a whole, and *international law claims* of the United States *in respect of nationals*.

13. This conclusion says nothing about whether Article 14(b) is "self-executing." Whether a treaty provision is self-executing determines whether the provision

changes domestic law without implementing legislation by Congress. Only if Article 14 obligated the United States to extinguish a category of domestic law claims, or to change domestic law rights or obligations, and no legislation implemented the obligation, would a court have to determine whether the obligation was self-executing as a matter of United States law. *See* IL&USL at 76–87. But where a treaty provision does not obligate the United States to change its domestic law in the first place, it is a question of the most conjectural sort to ask whether, *if it did*, it would be self-executing. Accordingly, no authorities dealing with whether a treaty provision is self-executing are relevant to the conclusion that the provision simply does not extend to domestic law claims.

14. That Article 14(b) does not extend to domestic law claims of nationals is directly supported by the contemporaneous Stikker-Yoshida correspondence of 1951. By note of September 7, 1951, Netherlands Minister of Foreign Affairs Dirk Stikker drew the attention of the Prime Minister of Japan to Foreign Minister Stikker's words addressed to the Peace Conference on the previous day:

It is my Government's view that article 14 (b) as a matter of correct interpretation does not involve the expropriation by each Allied Government of the private claims of its nationals so that after the Treaty comes into force these claims will be non-existent.

The question is important because some Governments, including my own are under certain limitations of constitutional and other governing laws as to confiscation or appropriating private property of their nationals. Also, there are certain types of private claims by allied nationals, which we would assume the Japanese Government might want voluntarily to deal with in its own way as a matter of good conscience or of enlightened expediency.

This statement is perfectly consistent with reading the waiver with respect to nationals found in Article 14(b) to extend only to international law claims of states in respect of individuals, and not to claims of nationals under domestic legal systems. Indeed, it is otherwise difficult to make sense of the Netherlands Foreign Minister's statement.

15. That Article 14(b) does not extend to domestic law claims of nationals is further supported by a law review article by the Counselor, at the time of writing, of the Japanese Embassy in London. Tetsuo Ito, *Japan's Settlement of the Post-World War II Reparations and Claims*, 34 JAPANESE ANNUAL OF INTERNATIONAL LAW 38 (1994). Mr. Ito's analysis, though it is his own and does not purport generally to represent official Japanese government opinion, has particular weight inasmuch as Mr. Ito is a former director of the Legal Affairs Division of the Treaties Bureau of the Japanese Foreign Ministry. At the end of a clear two-page discussion of the nature of international claims in respect of individual nationals, *id.* at 67–69, Mr. Ito reaches the following conclusion, describing it as the position of the Japanese Government:

[I]t seems the following view of the Japanese Government is persuasive: "the waiver by a state of claims of its nationals," provided for in treaties concerned, does not mean the renunciation of the right to claims themselves, which its nationals possess, or, at least, can claim to possess, on the basis of its municipal laws, but means the renunciation of the right of diplomatic protection, which the state possesses, in respect of the claims of its nationals, under international law. Therefore, after waiving the claims of its nationals in treaties, the state can not take up the issue of such claims on an intergovernmental basis, even if its individuals request to do so.

*Id.* at 68–69.

16. Finally, the Statement of Interest by the United States is remarkably bare of support for its apparently contrary analysis. It is true that courts defer to the opinion of the Executive Branch. The Statement of Interest filed on May 23, 2000, however, fails to provide any support for its conclusion that the Treaty of Peace and the War Claims Act created a remedy that excluded domestic law claims of U.S. nationals. The Statement of Interest states repeatedly (at 2, 4, 6, 10, 12, 13) that the Peace Treaty, along with the War Claims Act that provided for distribution of funds obtained by the United States pursuant to the treaty, created an exclusive remedy for compensation for prisoners of war. But nothing in the Statement of Interest actually supports this conclusion. First, Congress's desire that claims within the War Claims Commission's jurisdiction not be adjudicated by courts (Statement of Interest at 6) by its terms extends only to claims against the funds that the War Claims Commission was to distribute, *i.e.*, funds obtained for international legal claims. It is perfectly consistent with that intent for domestic law claims between nationals

of the two states to survive. Second, contrary to the Statement of Interest (at 10), the plain meaning of Article 14(b) does not support the argument that domestic law claims are extinguished. The plain meaning of “waive” is to the contrary. See paragraph 12, *supra*. Third, the discussion of the federal preemption doctrine (at 11–13) relies upon the treaty interpretation of Article 14(b) that domestic law claims are extinguished, but does nothing to support that underlying premise. All of the authorities cited in the Statement of Interest are fully consistent with the natural reading of Article 14(b), that the Allied Powers waived their international law claims. The Statement of Interest fails entirely to deal with the accepted distinction between international law claims and domestic law claims. The Statement of Interest fails to explain how language of “waiver” somehow means extinguishment. It fails to explain either the Stikker-Yoshida correspondence, or the Japanese Government views described in the Ito article. Accordingly, with respect to Article 14(b), the Statement of Interest contains no more than repeated governmental *ipse dixit* that domestic law claims of U.S. nationals have been excluded by a treaty, a treaty that simply does not say as much.

17. It should be added that domestic law claims of the United States *government* are also conceivably waived by Article 14(b), since it is possible that the United States gave up its right to pursue a class of claims in the domestic courts of Japan or the United States, in addition to waiving its international law claims. But with respect to domestic law claims of *U.S. nationals*, it is an entirely strained and unnatural reading of the words “the Allied Powers waive” to interpret it to mean the Allied Powers “take away” or “extinguish” claims of *their nationals* in domestic courts under domestic law. Under no accepted concept are such claims—in contrast with international law claims—theirs to “waive.”



## 世界抗日戰爭史實維護聯合會

**Global Alliance for Preserving the History of WW II in Asia**

P.O.Box 660483, Sacramento, CA 95866-0483 USA

### **Statement Submitted by Global Alliance for Preserving the History of WWII in Asia on the occasion of the House Judiciary Committee Hearing, September 25, 2002**

The Global Alliance for Preserving the History of WWII in Asia wishes to state, in the strongest terms, its staunch support for the passage of HR 1198. Too long have we ignored the interest of and justice due the brave men and women who, in defending our democracy and freedom in the Pacific Theater during WWII, were enslaved by the Japanese corporations. Too long have these Japanese corporations hidden their crimes against humanity behind the San Francisco Peace Treaty of 1951.

In a recent move to fight against these unredressed historical injustices, our POWs brought lawsuits against these corporations. They hope these actions in court would become the wedge to finally penetrate the shield of the San Francisco Peace Treaty. However, Judge Walker dismissed the consolidated POW case in 2000, and opined that Article 26 cannot be invoked by the plaintiffs. Rather, it must be invoked by the signatories to the Treaty, in this case, the U.S. government.

With this in mind, on March 22, 2001, Congressmen Dana Rohrabacher (R-CA) and Michael Honda (D-CA) introduced the Justice for United States Prisoners of War Act of 2001, HR 1198. The bill has the overall effect of preserving in federal court the cases brought by former POWs against Japanese companies. Specifically, it interprets Article 14 (b) as not constituting "a waiver by the United States of claims by nationals of the United States. Further, Section 4 of H.R. 1198 states that it is U.S. policy "...to ensure that any war claims settlement terms between Japan and any other country that are more beneficial than terms extended to the United States under the above Treaty are extended to the United States in accordance with article 26 of the Treaty..." The House version had to date over 200 co-sponsors.

It is time for justice to prevail and for the Japanese multinationals to be called upon in the U.S. courts to answer for their crimes against humanity. It is time for Congress to take another look at the victims' plight and gain a fresh understanding of the tremendous odds against which these POWs labor. It is time for Congress to do the right thing. And the right thing is to vote for HR 1198.

The Global Alliance for Preserving the History of WW II in Asia (GA) is a nonprofit, nonpartisan worldwide federation of over 40 grassroots organizations. Founded in 1994, its mission is to preserve the historical accuracy of WW II in Asia. For only in preserving history can we secure justice for victims, safeguard humanity from repeating mistakes of the past, and bring about a genuine reconciliation and lasting friendship among all peoples.

## PREPARED STATEMENT OF PROFESSOR DETLEV F. VAGTS

It has been indicated to me that it would be helpful if I stated my opinion with respect to the international law issues that would be raised by enactment of H.R. 1198, The Justice for United States Prisoners of War Act of 2001. That suggestion came originally from counsel for the government of Japan but I wish to emphasize that I have not been engaged by that government and am not being compensated by it.

I was actively involved in rendering opinions in connection with the recent settlement of claims against German industrial firms arising out of their involvement with forced and slave labor operations of the German government during World War II. That gave me some familiarity with the problems of post-war settlements though one must be careful to distinguish between two very different treaty structures. I have read the testimony presented to the Committee by the Legal Adviser to the State Department and other witnesses. I also re-read the opinion in *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp.2d 939 (N.D. Cal. 2000).

After considering these matters I am of the opinion that Art. 14 of the Peace Treaty with Japan of 1951 was intended to settle all claims by governments or private parties against Japan and Japanese nationals. That is the plain meaning of that provision and corresponds with the purpose of that provision. It was intended to give the defeated nation of Japan a fresh start in reviving its economy so as to lift the burden of supporting it from the shoulders of the United States. There is no reason to limit it to claims under international law which could be espoused by the United States. Most dramatically, the settlement with Iran in 1980 related particularly to commercial claims of private American parties. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981). The London Agreement on German External Debts of 1953 also settled private and public claims arising under international law or commercial law.

My opinion, further, is that the most favored nations clause of article 26 of the Peace Treaty did not operate so as to revive such claims. I have examined a number of the agreements between Japan and other countries that have been cited. They provide for the payment of specified sums by Japan to those nations. They do not cancel or modify the waiver provision of art. 26 to which those nations were also parties and thus do not provide additional benefits to those states. In any case, the judgment as to whether a most favored nation clause has been activated is one for the executive branch to make. It has long been held that questions of the performance of a treaty by the other party or the termination of a treaty by virtue of change circumstances is an executive function. *Charlton v. Kelly*, 229 U.S. 447 (1913); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984). Cf. *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961), giving great weight to executive's construction of most favored nation clause.

I share Mr. Taft's view that those Americans who suffered as prisoners of war under terrible conditions in Japanese confinement deserve more compensation than they in fact have received. I would add that the same is true of those who suffered like treatment at the hands of Nazi Germany even though on average conditions in German camps were less horrendous. Both received only the meagre compensation afforded under the War Claims Act of 1948.

An expert giving an opinion on international law is relieved of the normal obligations of modesty and so I will state my qualifications. After graduation from the Harvard Law School in 1951 I was an associate in a New York law firm during which time I worked on various cases arising out of World War II. I was for a time on active duty with the U.S. Air Force and handled some claims against the United States. I have taught at the Harvard Law School since 1959 and am currently the Bemis Professor of International Law. I served as Counselor on International Law in the Department of State in 1976-77 and as an Associate Reporter of the Restatement of Foreign Relations Law (third) in 1979-87. I have been a member of the board of editors of the *American Journal of International Law* since 1978; I was book review editor from 1984 to 1993 and was editor in chief, along with Professor Theodor Meron from 1993 to 1998. I have written several books and numerous articles on various aspects of international law.

I hope that the Committees will find this statement helpful and stand ready to provide such further views as may be required.

## RESPONSE OF JAMES V. FEINERMAN

As the son of a World War II veteran who served in the United States Navy for over three years in the Pacific theater, I want to state at the outset that I fully recognize the great debt all Americans owe to those who fought for our freedom during the World War II, especially to those, such as plaintiffs in these actions, who suffered grievously as prisoners of war. Nevertheless, notwithstanding the strong moral arguments for condemnation of the suffering inflicted upon them, plaintiffs' claims are barred as a matter of international law by international treaties entered into by the United States to bring World War II to an end, in the Treaty of Peace with Japan of September 8, 1951 ("Treaty").

Under the terms of this international agreement, the Japanese Government recognized its obligation to pay reparations for the damage and suffering it caused by its wartime actions; in the opinion of most objective analysts, Japan honored this commitment by providing reparations to an unprecedented extent. The 1951 Treaty gave the United States and the other Allied Powers the right to seize and dispose of public and private Japanese assets located within their territories. In return, Article 14 of the Treaty expressly waived the claims of the Allied nations arising out of actions taken by Japan and its nationals during the war on behalf of themselves and their nationals.

By their express waiver of claims against Japan and its nationals, the Allied Powers undertook to use seized Japanese assets within their control to compensate their nationals according to their individual determination of what would be deemed fair and equitable. In the United States, a War Claims Fund was established with the seized assets under the War Claims Act, 28 U.S.C. §§ 2001–2017, and distributed by the War Claims Commission. Thus, monetary damage awards for former prisoners of war had been funded with the proceeds of the assets that were seized from Japan and its nationals under the terms of the Treaty.

The decision of the United States to join the 1951 Treaty along with dozens of other nations was the result of years of negotiation and also reflected a broad, bipartisan consensus within the Executive and Legislative Branches. The to sign and ratify the Treaty was based on other important foreign policy considerations, including a hope to avoid repeating the mistakes of the Versailles Treaty ending World War I as well as a wish to keep modern Japan—after the end of the United States Occupation—as a strong, democratic ally that would stay outside of the orbit of Asian Communism then advanced throughout mainland China and North Korea. For these reasons, along with massive reparations paid by Japan, the collective wisdom of contemporary observers was that all claims against Japan and its nationals should be waived.

## THE APPLICABLE RULES OF TREATY INTERPRETATION

For over five decades, the Treaty with Japan has served U.S. interests and supported peace and stability in the region. Under longstanding principles of international law, particularly *pacta sunt servanda* (as understood in the United States, the principle that, "Every international agreement in force is binding upon the parties to it and must be performed by them in good faith," see Restatement (Third) of Foreign Relations Law of the United States § 321 (1987)), the United States must honor its international agreements, including the Treaty with Japan. For U.S. or Allied citizens to reopen the question of international commitments and obligations under the 1951 Treaty would thus be tantamount to an attempt to abrogate a binding international commitment. Moreover, it is definitely my view that the Treaty preempts plaintiffs' state law causes of action. See also Restatement (Third) of Foreign Relations Law of the United States § 321, Comment a (1987) (": '[P]acta sunt servanda' . . . lies at the core of international agreements and is perhaps the most important principle of international law.").

Particularly in the context of international treaty practice, where the contracting parties are sovereign states expressing their positions on matters of national importance, it is of special concern to determine accurately the mutual intent of the parties. Any judicial deference to the position of only one of the sovereign parties, long after the initial negotiation of the treaty's terms, which ignores the views of the other violates longstanding United States judicial precedent and international legal practice. [cite]

The United States Supreme Court has held that a court's role in construing a treaty is to give "effect to the intent of the Treaty parties." *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982). In that case, the Court examined the views of both parties to the treaty and found that both had agreed on the correct interpretation. Yet, as the Court noted in that case, "[T]he clear import of treaty language controls unless 'application of the words of the treaty according to their

obvious meaning effects a result inconsistent with the intent of or expectations of its signatories.”<sup>88</sup> *Id.*, at 180. See also *Kolovrat v. Oregon*, 366 U.S. 187, 194–195 (1961).

In *United States v. Stuart*, 489 U.S. 353, 365–66 (1989), the Court reaffirmed its holding in *Sumitomo*, finding that a treaty should be interpreted to carry out the intent or expectations of its signatories. The body of Supreme Court case law recognizes that treaties are contracts between sovereign states; thus, they should be carefully construed with a view toward giving effect to the intent of the sovereign government signatories. See also *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 167 (1999) and *Zicherman v. Korean Airlines*, 516 U.S. 217, 223 (1996). The judicial obligation is to satisfy the intention of both of the signatory parties in construing the terms of a treaty. *Valentine v. United States, ex rel. Neidecker*, 299 U.S. 5, 11 (1936).

The clear weight of U.S. authority is that a treaty must be construed in accordance with the intent of all of the parties. This means that the United States must endeavor to interpret any agreement still in force in a manner which seeks an interpretation congruent with that of the other sovereign state party to the treaty at the time of the treaty’s negotiation, a signal responsibility in this process.

The Vienna Convention on International Treaties sets forth the applicable rules of treaty interpretation. The United States Department of State recognizes that Articles 31 and 32, which set forth the principal and supplementary means of interpretation, reflect customary international law. See Letter from Roberts Owen, Legal Adviser, Dep’t of State, to Senator Adali E. Stevenson, September 12, 1980, Department of State File No. P80 0124–1938. See also Restatement (Third) of the Foreign Relations Law of the United States, § 325, which follows Article 31 of the Vienna Convention.

United States courts have also treated provisions of the Vienna Convention as authoritative. See, e.g., *Kreimerman v. Casa Veekamp, S.A., de C.V.*, 22 F.3d 634, 638, n.9 (5th Cir. 1994); *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1350, 1362 (2nd Cir. 1992).

As set forth in the Vienna Convention, the principal rule for determining the intent of the parties to a treaty is that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.” Vienna Convention, art. 31 (1). The context of a treaty includes (1) the operative provisions of the text, (2) the preamble, (3) agreements relating to the treaty.

Finally, the United States’ interpretation of its treaty obligations is often accorded great deference by courts because of important prudential considerations, particularly if there is a “potentiality of embarrassment from multifarious pronouncements by various departments on one question” and if there is an “unusual need for unquestioning adherence to a political decision already made.” *Baker v. Carr*, 396 U.S. at 217 (outlining the factors to be considered in determining whether a case presents a non-justiciable political question). In this case, the Treaty, along with a bilateral security agreement the United States entered into with Japan on the same day the Peace Treaty was signed, forms the very basis of U.S.-Japan relations, and has been the very cornerstone of our country’s foreign policy and regional security in East Asia and the Pacific for the past 50 years. If individual plaintiffs were allowed to impose their interpretation of the Treaty on a piece-meal basis through litigation, and if the Japanese government considered the United States to be in violation of the Japan Peace Treaty as a result, this could have a potentially serious negative impact on U.S.-Japan relations.

*A Note on Sovereign Immunity Principles.* At the time the Treaty was signed, both the United States and Japan subscribed as a principle of international law to the absolute theory of sovereign immunity. In the context of these cases, it is important to note that as a matter of international law, most nations in the mid-twentieth century accepted the notion that nation-states, and only nation-states, could be principal actors in the international legal arena. Their power to act was plenary, with very few limits. Without their express prior consent, they were immune to suit, for example. Interestingly, the United States came to accept the restrictive theory of sovereign immunity rather late. In continental Europe, such notions had been evolving for almost a century and had gained acceptance in the years following World War II. Before the United States adopted the restrictive theory of sovereign immunity by statute in 1976, it had already recognized its currency by means of the famous “Tate Letter” of 1952. Letter from Jack B. Tate, Acting Legal Advisor of the Department of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952), reprinted in 26 Dep’t State Bull. 984 (1952) (indicating that it would thereafter be the policy of the United States Government to adopt the restrictive theory of sovereign immunity). In this letter, the United States Department of State indicated that it was adopting the restrictive theory of sovereign immunity thenceforth, in line

with what the State Department perceived as the general practice of nations. The letter served as an important policy document from the State Department, since before the adoption of the Foreign Sovereign Immunities Act of 1976, the judiciary turned to the State Department for its guidance on questions of sovereign immunity whenever the defense was raised. As noted by the Second Circuit opinion in *Victory Transport, Inc. v. Comisaria General*, 336 F.2d 354, 358 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965), federal courts had repeatedly held: “[i]n delineating the scope of a doctrine designed to avert possible embarrassment to the conduct of our foreign relations, the courts have quite naturally deferred to the policy pronouncements of the State Department.”

Prior to the U.S. decision to embrace the restrictive theory of sovereign immunity in 1952, adherence to the absolute theory of sovereign immunity resulted in virtually complete judicial deference to executive branch immunity determinations. The U.S. Supreme Court—in *Ex Parte Peru*, 318 U.S. 578 (1943), and again in *Mexico v. Hoffman*, 324 U.S. 30 (1945)—held that executive determination of immunity constituted a conclusive determination. In *Mexico v. Hoffman*, 324 U.S. at 35, the Supreme Court definitively concluded that “it is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.” Such deference was based on the belief that wrongs to foreign nations (and vice versa) were better righted through diplomatic negotiation than through the courts due to the possible impact on U.S. foreign relations. The courts also perceived a need to defer to State Department determinations to prevent unnecessary embarrassment to the executive branch in its conduct of foreign policy. In *Mexico v. Hoffman*, 324 U.S. at 30, Chief Justice Stone wrote that “it is a guiding principle in determining whether a court should exercise or surrender its jurisdiction in such cases, that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs . . .” As long as absolute sovereign immunity was generally accepted in the international community, this deference was understandable and desirable.

Given the identity of the defendants in the prisoners-of-war cases, sovereign immunity is not expressly an issue; however, the historic changes in international law have occurred since the 1950s, including the codification of principles of restrictive sovereign immunity in the Foreign Sovereign Immunities Act of 1976, 28 United States Code Secs. 1330, 1332(a)(2)–(4), 1391(f), 1441(d), 1602–1611).

#### THE 1951 TREATY OF PEACE WITH JAPAN

*A. Treaty Provisions.* Article 14(b) of the 1951 Treaty states that, “[e]xcept as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war[.]” 3 U.S.T. 3169. In a parallel provision, under article 19(a) of the Treaty, Japan waived all claims of Japan and its nationals against the Allied Powers and their nationals arising out of the war and subsequent occupation, including, for example, claims against the United States, the manufacturers of the atomic bombs, and the individuals who ordered and performed the bombings of Japan which devastated Hiroshima and Nagasaki.

As Judge Walker noted, *In re World War II Era Japanese Forced Labor Litig.*, 114 F. Supp. 2d at 945, the language of Article 14(b) is “strikingly broad.” It could not be clearer or more expansive: the Allied Powers waived not only their own claims but “those . . . of their nationals” as well. At the same time, the Allies waived “all . . . claims . . . arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war.” The plain meaning of this language necessarily encompasses all claims relating to the treatment of Allied prisoners of war by Japanese nationals during the prisoners’ captivity.

Moreover, under the Treaty and its implementing legislation, Allied prisoners of war received compensation paid from assets seized *from Japanese corporations*. Under Article 16 of the Treaty, assets of Japan and Japanese nationals (including corporations) located in countries that were neutral during the war or that had fought against the Allies were used to compensate Allied prisoners of war for their war-related injuries. The United States Senate amended the War Claims Act after the Treaty’s ratification to allow payment of additional compensation to prisoners of war who had suffered specified violations of the Geneva Convention, including claims “relating to labor of prisoners of war.” See 50 U.S.C. App. § 2005(d)(2)(A). These payments came from assets seized from Japan and Japanese corporations pursuant to Article 14(a)(2) of the 1951 Treaty.

Assertions of law professors Ramsey, Maier and Rogers fail to establish any limits on the broad sweep of the language of Article 14(b). Professor Ramsey contends that

Article 14(b) only waives the claims of Allied nationals against Japanese nationals that “act[ed] as agents of, or otherwise under the control and direction of, the Japanese government,” arguing that “the phrase ‘prosecution of the war’ can only refer to governmental actions.” Yet Article 14(b) applies to Japan “and its nationals.” Professors Maier and Rogers contend in different language that the Allies did not, in fact, waive their nationals’ claims at all, but, rather, waived their rights under a version of *parens patriae* theory to make future claims at the governmental level on behalf of their respective nationals arising out of the prosecution of the war. The language of the Treaty is to the contrary. It states that the Allies “waive all . . . claims of . . . their nationals” arising out of the war’s prosecution. The Senate understood these words to mean what they say. See S. Exec. Rep. No. 82–2 (1952), at 13 (noting that in the Treaty the Allies “waive their claims and those of their nationals”). Professor Maier contends that a government cannot “waive” its national’s claim “until the government espouses the injured individual’s claim.” A long line of Supreme Court decisions clearly establishes the broad authority of the federal government to compromise the claims of its nationals. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 679–80 (1981) (“nations have often entered into agreements settling the claims of their respective nationals”). That is what the United States did in the 1951 Treaty. Article 14, while waiving claims, also authorized the United States to seize Japanese assets worth, in 1952, an estimated \$90 million, from which the prisoners of war were substantially compensated. Indeed, it was understood at the time to be the responsibility of the Allied governments to do this, using the proceeds of the assets forfeited.

Professor Rogers argues that Article 14(b) does not waive a citizen’s own claims but rather international law claims of the government based upon injuries to its nationals. Professor Rogers’ conclusion that a private individual’s claim under domestic law cannot be “waived” by the state, because it is not the state’s claim is inconsistent with judicial precedent. The Supreme Court has stated that the power of governments to settle the claims of their respective nationals against their wishes is necessary because, “[n]ot infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are ‘sources of friction.’” *Dames & Moore*, 453 U.S. 654, at 679 (1981). The Supreme Court has also recognized that domestic law claims by the citizens of one country against those of another may be just as much a “source of friction” as claims against a foreign government itself.—*United States v. Pink*, 315 U.S. 203, 225 (1942) (noting that “the existence of unpaid claims against Russia and its nationals which were held in this country . . . had long been one impediment to resumption of friendly relations between these two great powers” (emphasis added)). See also *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1523 (D.C. Cir. 1984) *cert. denied*, 470 U.S. 1051 (1985); Restatement (Second) of Foreign Relations Law of the United States §213 (1965) (President “may waive or settle a claim against a foreign state . . . [even] without the consent of the [injured] national”). Theories advanced by Professor Rogers to the contrary would upset settled case law precedent and international law and practice necessary to the conduct of foreign relations by the United States through the Executive Branch.

When public hearings on the Treaty were held in January 1952, the specific issue of reparations claims was raised. The records confirm that the Senate was well aware that all individual claims were being waived by Article 14(b), and that such claims would be dealt with exclusively through legislation. One legislator even attempted to limit the effect of Article 14(b) by proposing a reservation to the Treaty stating that “nothing contained in this Treaty shall be construed to abrogate the . . . just and proper claims of private citizens of the United States.” See 98 Cong. Rec. 2365, 2567–71 (1952). In a memorandum, Adrian S. Fisher, the Legal Adviser for the U.S. Department of State, who later went on to serve as Dean of Georgetown University’s Law Center, informed Secretary of State Acheson that this reservation was “in direct conflict with Article 14(b),” and that, if this reservation were added to the Treaty during the ratification process, “a renegotiation of the Treaty Article would unquestionably ensue.” Memorandum to The Secretary from Mr. Fisher (the Legal Adviser), dated March 19, 1952, at 4, 5. The Senate gave its advice and consent to the Treaty on March 20, 1952, by a vote of 66 to 10, without adding a single reservation pertaining to war claims in its resolution of advice and consent. 98 Cong. Rec. 2594 (1952).

Consistent with the Vienna Convention on the Law of Treaties, the Supreme Court has indicated that courts should begin their analysis of the appropriate interpretation of a treaty with the text. See *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989); Vienna Convention on the Law of Treaties (1969), Article 31, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given the terms of the treaty

in their context and in the light of its object and purpose”). Although the United States has not ratified the Convention, it is generally “recognized as the authoritative guide to current law and practice.” S. Exec. Doc. L., 92d Cong. 1st Sess. 1 (1971). The language of the Treaty thus indicates that plaintiffs’ claims against defendants were waived and settled in 1951. To read Article 14(b)’s provision as not applying to U.S. and Allied prisoners of war would not only would be contrary to the express language of the agreement, but would also require an impermissible judicial amendment to the Treaty. See *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989) (“where the [treaty] text is clear, as it is here, we have no power to insert an amendment”); *Victoria Sales Corp. v. Emery Air Freight, Inc.*, 917 F.2d 705, 707–08 (2d Cir. 1990) (where “the text of a treaty is clear, a court shall not, through interpretation, alter or amend the treaty”) (citing *Chan*, 490 U.S. at 134). The Court, in short, must be “governed by the text—solemnly adopted by the governments of many separate nations[.]” *Chan*, 490 U.S. at 134. The claims of U.S. and Allied nationals in these lawsuits, therefore, should be dismissed.

It is well-established that the “clear import of treaty language controls unless ‘application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.’” *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180 (1982) (quoting *Maximov v. United States*, 373 U.S. 49, 54 (1963)). Drafting history should be consulted only to “elucidate a text that is ambiguous.” *Chan*, 490 U.S. at 134. See also Vienna Convention on the Law of Treaties, Article 32 (“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31 or to determine the meaning when the interpretation according to Article 31 (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable”). In the case of the 1951 Peace Treaty, no contrary intent or expectations undermining the clear text are evident in the historical record. Instead, a review of the negotiating and drafting history, as well as the legislative record of the Senate’s advice and consent, reveals that the Peace Treaty was intended to waive all claims of U.S. and Allied nationals against Japan and Japanese nationals without exception.

B. *No Waiver in Article 26 of Article 14(b)*. Article 26 of the Treaty does not provide a basis to avoid the broad waiver in Article 14(b). Article 26 states that, “[s]hould Japan make a peace settlement or war claims settlement with any State granting that State greater advantages than those provided by the present Treaty, those same advantages shall be extended to the parties to the present Treaty.” To the extent there is an argument that any other treaty might provide “greater advantages” than the Peace Treaty, such a determination rests solely in the hands of the United States. The State Department has never concluded that any of Japan’s other post-war treaties conferred “greater advantages” as that term is used in Article 26. In fact, many of the treaties were negotiated with the United States’ support, encouragement, and, in some cases, direct involvement.

First, Article 26 specifically states that “advantages shall be extended to the *parties* present to the Treaty,” namely, signatory governments and not individual citizens. Treaty, Article 26 (emphasis supplied). Article 26 thus does not create private rights or authorize private parties or courts to rewrite the Peace Treaty based on the conjecture that another country’s treaty is more favorable than the Peace Treaty. This interpretation is consistent with the well-established principle that “[i]nternational treaties are not presumed to create rights that are privately enforceable.” *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir.), *cert. denied*, 506 U.S. 955 (1992). Restatement §907 comment a (“[i]nternational agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts”).

Second, there is no evidence in the historical record that the drafters of the Treaty, or the Senate that acted to ratify the Treaty, intended the broad waiver in Article 14(b) to be abrogated every time Japan entered into a bilateral settlement agreement. The historical record overwhelmingly indicates that Article 14(b) was intended to be a final settlement of all war related claims. To that end, the United States has consistently maintained that Article 14(b) settled all claims of U.S. and Allied nationals against Japan and its nationals, Article 26 and other treaties notwithstanding.

Third, the claim that other treaties identified by plaintiffs are more advantageous is incorrect and perhaps impossible to determine. Assessing whether Japan granted any “greater advantages” in its subsequent bilateral peace settlement agreements than those gained by the United States in the Peace Treaty would require an “appraisal of a great variety of relevant conditions, political, social, and economic which can hardly be said to be within the appropriate range of evidence receivable in a

court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as a the basis of deciding a controversy.” *Coleman v. Miller*, 307 U.S. 433, 453–54 (1939) (noting that any case requiring that such an assessment be made presents a non-justiciable political question). If individual plaintiffs were allowed to articulate their view of what constitutes a “greater advantage” for the United States, consideration of such claims would create the “potentiality of embarrassment from multifarious pronouncements” in the field of foreign relations, where the need for this country to speak with one voice is at its greatest. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

None of the treaties ratified by European nations (cited by Professor Rogers) provided to those countries the crucial benefits obtained by the United States for itself and its nationals in Article 19. The absence of a reciprocal waiver of national-vs-national claims would render these treaties less advantageous than the 1951 Treaty was for the United States.

The Netherlands is a party to the 1951 Treaty and, thus, is bound by the terms of Article 14(b). The Treaty between Japan and Burma also contains a waiver provision identical to that of Article 14(b) of the 1951 Treaty. *See Treaty of Peace Between the Union of Burma and Japan*, Nov. 5, 1954, Art. V.2 (“the Union of Burma waives all claims of the Union of Burma and its nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war”). Subsequent to the 1951 Treaty, Japan made a *voluntary* payment of \$10 million to the government of the Netherlands in recognition of the suffering of Dutch civilian internees during the war. In its treaty with Burma, Japan promised to make reparations to Burma in the form of Japanese goods and services worth approximately \$20 million per year for ten years. With respect to the payments from Japan to Burma, it should be noted that the 1951 Treaty of Peace had itself contemplated that Japan would make arrangements with those nations that it had occupied during the war “to compensate those countries for the cost of repairing the damage done, by making available the services of the Japanese people in production, salvaging and other work for the Allied Powers in question.” Art. 14(a) Burma had been occupied by Japan during the war, so the provision for assistance to Burma in the Burmese Treaty did not grant it “greater advantages” than it would have had under the 1951 Treaty. These treaties do not establish a basis for allowing litigation of Allied nationals’ claims waived by the Treaty.

C. *The State Claims Are Preempted By The Treaty And The War Claims Act.* Article VI of the U.S. Constitution provides that “the Laws of the United States . . . and all *Treaties* made . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the . . . Laws of any State to the Contrary notwithstanding.” U.S. Const. art VI, cl. 2 (emphasis added). As the Supreme Court recently reiterated in *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), a fundamental principle of the Supremacy Clause is that the Federal government has the power to preempt state law, “even without an express provision of preemption.” *Id.* State law must yield when “Congress intends federal law to ‘occupy the field.’” *Id.* (quoting *California v. ARC America Corp.*, 490 U.S. 93, 100 (1989)). “And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute,” or where it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.* (citing *Hines v. Davidowitz*, 312 U.S. 52, 66–67 (1941)). It is clear that Section 354.6 of the California Code of Civil Procedure must yield to the 1951 Peace Treaty with Japan and the War Claims Act.

As a preliminary matter, it is well-settled that “state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement.” *United States v. Pink*, 315 U.S. 203, 230–31 (1942). Under our federal scheme of government, the United States possesses authority over foreign relations and, therefore, a unique interest in foreign relations not shared by California or any other state. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423–25 (1964); *Curtiss-Wright Export Co.*, 299 U.S. at 316. If state laws and policies did not yield before the exercise of the external powers of the United States, then our foreign policy might be thwarted, and there would be “great potential for disruption and embarrassment” of the United States in the conduct of foreign affairs.

There is a powerful constitutional presumption that the conduct of international relations requires national uniformity and a single definitive authority. Although the Constitution makes no specific grant of power to the Congress to regulate foreign relations, such powers have been conceded to be indispensable to the federal government in dealing with foreign countries as a sovereign nation. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). Furthermore, the Constitution specifically grants Congress the sole power to ratify treaties which the President makes with foreign powers, U.S. Const. Art 1, Sec. 10, cl. 1, and only the President

may make treaties and appoint ambassadors to foreign countries, U.S. Const. Art. 2, Sec. 2, cl. 2. From these explicit grants of foreign relations power to the federal government wider national authority in regulating foreign affairs has been inferred in areas essential to the conduct of foreign relations. The very existence of federal power to control foreign relations, even when unexercised, may not only support federal power to act but may also preclude any state action as well.

The United States Supreme Court has made it clear that statutes which involve a state in policies of foreign governments and questions of international relations are unlawful, even though the statute may be intended to regulate an area governed by state legislation or open to both Congressional and state oversight. State regulations must give way "if they impair the effective exercise of the Nation's foreign policy." In the area of state interference with foreign relations, the leading case is the Supreme Court's opinion in *Zschernig v. Miller*, 389 U.S. 429 (1968). The court held that the enforcement of a state statute was unconstitutional where the provisions of the statute involved the state in matters of foreign affairs and international relations. In *Zschernig*, the Supreme Court was called upon to decide the validity of the Oregon version of the so-called "iron curtain" acts, which restricted the inheritance of property by residents of certain foreign countries, primarily Communist nations, withholding such property until it could be distributed with the assurance that the designated beneficiary would receive the "benefit, use and control" of the property, or for its escheat if no assurances could be given. In almost every case, there was an underlying political purpose, reflecting anti-Communist sentiments (which had engendered this legislation in the first place) which were widely held throughout United States society at the time they were passed.

A disturbing aspect of this idea of expressing opposition to Communism by manipulating state laws governing inheritance, from the point of view of United States foreign policy, was the disparity among such statutes in the various states, creating a chaotic situation in an area which was far more amenable (for uniformity alone) to federal regulation and control. Justice Douglas, who wrote the opinion in *Zschernig*, decided that the Oregon statute in question there was: ". . . an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress. See *Hines v. Davidowitz* . . . (citation omitted)." 389 U.S. at 432. In *Hines v. Davidowitz*, 312 U.S. 52 (1941), the court had noted that international controversies with the gravest consequences, sometimes even leading to war, had arisen from real or imagined wrongs to a country's subjects inflicted or permitted by another government. In *Zschernig*, the Court realized the danger that might arise if each state, through its probate laws, were allowed to establish its own foreign policy.

The federal government, "in the exercise of its superior authority in [the field of foreign relations], has enacted a complete scheme of regulation" to address World War II related claims against Japan and its nationals. *Hines*, 312 U.S. at 66. California cannot now "inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, [that] federal law." *Id.*; see also *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983); *Beveridge v. Lewis*, 939 F.2d 859, 862 (9th Cir. 1991). Because Cal. Civ. Proc. Code §354.6 interferes with long-standing foreign policy judgements centering around the 1951 Peace Treaty, it necessarily is preempted. *United States v. Pink*, 315 U.S. 203, 230-31 (1942) ("state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement"). If state laws and policies did not yield before the exercise of the external powers of the United States, then our foreign policy might be thwarted, and there would be "great potential for disruption or embarrassment" of the United States in the international arena. *Zschernig v. Miller*, 389 U.S. 429, 435 (1968). In this instance, it goes beyond the "potential" for embarrassment. The Government of Japan affirmatively has stated that it could disrupt U.S. relations with Japan.

#### CONCLUSION

The purpose of the 1951 Treaty of Peace with Japan was to restore Japan's sovereignty, anchor Japan as a free-market ally in Asia at a time when we faced a communist threat, and settle all claims against the Government of Japan and Japanese nationals, while also settling any potential Japanese claims against the Allies and their nationals. In the light of these purposes, no reasonable interpretation of the Treaty could envision the possibility of future war reparations or other war-related claims such as those advanced by the prisoners of war to be brought before the courts of the United States. In return for the forfeiture of Japan's assets abroad, which provided a comprehensive compensation program for its wartime victims, any future claims were supposed to be preempted.

RESPONSE OF THE DEPARTMENT OF STATE TO QUESTIONS RAISED  
DURING THE SEPTEMBER 25, 2002 HEARING BEFORE THE HOUSE  
COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON IMMIGRATION,  
BORDER SECURITY, AND CLAIMS CONCERNING THE RESULTS OF U.S.  
GOVERNMENT DISCUSSIONS WITH JAPAN ON POW COMPENSATION AND  
PAST JAPANESE APOLOGIES FOR ITS WARTIME ACTIONS

Senior Administration officials have raised the issue of U.S. POW compensation with Japanese officials on a number of occasions since the beginning of the Bush Administration. Secretary of State Powell, Deputy Secretary of State Armitage, Bureau of East Asian and Pacific Affairs Assistant Secretary of State Kelly and his bureau colleagues, and U.S. Ambassador Baker and members of his staff have all engaged on this issue with their Government of Japan counterparts.

During these discussions, Administration officials explained the strong feelings that the POW compensation issue is generating in the Congress and the public, noting that these will persist regardless of the fate of current Congressional legislation. While stressing that we remained firmly committed to upholding all provisions of our Peace Treaty, we have asked whether there were ways consistent with the Treaty in which Japan might address these concerns. The Japanese consistently replied that the Treaty intentionally and definitively settled all war-related claims, including those of U.S. POWs, and thus the payment of compensation would be impossible. They have also observed that unilateral efforts to reinterpret these treaty provisions would provoke strong reactions among the Japanese people and could weaken support for our critically important alliance.

We have pointed out that the Japanese Government has established scholarship and exchange programs for POWs and their descendants from the UK, the Netherlands and Australia after those countries established compensation programs for their own POWs. Japanese representatives have acknowledged this, but noted that these programs were not intended or perceived as compensation. They did not rule out the possibility of such programs being considered in the future with the United States. However, to ensure there was no misunderstanding about the nature of such programs, they could be undertaken only after other

governments concerned resolved any issues involving compensation for their nationals on their own.

The Japanese Government formally apologized for the World War II actions of the Imperial Japanese Government. On August 15, 1995, the fiftieth anniversary of the war's end, then Prime Minister Tomiichi Murayama issued an official apology on behalf of the Japanese Government and the Japanese people. Prime Minister Murayama's statement expressed "deep remorse" and a "heartfelt apology." He also expressed his feelings of "profound mourning for all victims, both at home and abroad." The Japanese Government addressed this apology to all of the war's victims, including those who died in combat.

During a September 8, 2001 speech commemorating the 50<sup>th</sup> anniversary of the signing of the San Francisco Peace Treaty, then Japanese Foreign Minister Makiko Tanaka expressed an apology that explicitly included POWs. She acknowledged that World War II "has left an incurable scar on many people, including former prisoners of war." The Foreign Minister reaffirmed "our feelings of deep remorse and heartfelt apology" expressed in Prime Minister Murayama's 1995 statement. The texts of the Murayama and Tanaka statements are attached.

ANALYSIS OF TREATIES ALLEGEDLY  
PROVIDING "GREATER ADVANTAGES"

As demonstrated below, plaintiffs' suggestion that Japan entered into treaties with other nations that granted "greater advantages" than provided under the 1951 Treaty is not borne out by an analysis of the actual agreements. In the State Department's view, these treaties do settle the respective nationals' war-related claims against Japanese nationals. Even to the extent such claims are not waived explicitly, very clearly none of the cited treaties specifically provides for litigating such claims. Therefore, the most that could possibly be said of any of these agreements is that the issue of nationals' war-related claims remains unsettled. By the terms of Article 26, the absence of a war claims settlement between Japan and another nation would not be a basis for invoking the United States' rights under that Article. Moreover, many of the treaties relied upon by plaintiffs do not include a waiver by Japan of its and its nationals' war-related claims. The absence of such a waiver, such as the United States obtained for itself and its nationals in Article 19 of the 1951 Treaty, would render those treaties less advantageous to the United States than the 1951 Treaty.

Nor may the fact that some countries obtained further payments from Japan be cited as a basis for invoking Article 26 to allow litigation of American POWs' claims. The nations that received such additional compensation were countries that Japan had occupied during the war. The 1951 Treaty of Peace itself provided in Article 14(a)1 that Japan would make arrangements with those nations that it had occupied during the war "to compensate those countries for the cost of repairing the damage done, by making available the services of the Japanese people in production, salvaging and other work for the Allied Powers in question." This was to ensure that Japan, rather than the United States and its Allies, would bear the burden of rebuilding those areas that Japan had occupied. Japan's compliance with its obligations under Article 14(a)1 of the 1951 Treaty, or its extension of the same terms to other countries that had been similarly occupied during the war, could not be the basis for the United States to avoid its obligations under the 1951 Treaty. In any event, none of the agreements by which Japan made such payments allowed litigation of individual claims. Therefore, they could not possibly establish a basis for allowing litigation of U.S. POW claims that the United States waived in the 1951 Treaty.

Below, we address in turn the various agreements that have been cited by plaintiffs.

(1) The Philippines and Vietnam are both parties to the 1951 Treaty of Peace with Japan, and, like the United States, are bound by the express waiver in that Treaty (Art. 14(b)) of "all \* \* \* claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." The Philippines and Vietnam had each been occupied by Japan during the war and, as provided in Article 14(a)1, were therefore entitled to additional reparations to help rebuild their countries. Japan entered into subsequent agreements with the governments of the Philippines and Vietnam to provide such compensation. Notably, these agreements specifically declare (Preamble) that they are entered into out of a "[d]esire to act in line with the provisions of the Treaty of Peace with Japan signed at the city of San Francisco on September 8, 1951."

(2) The Netherlands is also a party to the 1951 Treaty, and is bound by Article 14(b)'s waiver of Dutch nationals' war-related claims. In a letter to Mr. Stikker, the Dutch Foreign Minister, regarding Article 14(b)'s waiver provision, Prime Minister Yoshida of Japan specifically noted that, under the Treaty, Dutch citizens "will not be able to obtain satisfaction regarding [their private] claims" arising out of the war. In 1956, the Japanese government made a voluntary payment of \$10 million to the Dutch government in recognition of the fact that Dutch civilian internees, who had been living in Indonesia at the time of the war, had suffered as much as the Allied POWs; however, unlike POWs who were provided for in Article 16, no special provision had been made for compensating civilian internees. This voluntary payment, made by the government of Japan as a gesture of goodwill, is outside the scope of Article 26, and, in any event, could not serve as the basis for allowing litigation of individual POW claims.

(3) Japan's treaties with **Burma** (Art. V.2) and **Indonesia** (Art. 4.2) contain precisely the same waiver language that appears in Article 14(b) of the 1951 Treaty: "the Union of Burma waives all claims of the Union of Burma and its nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." Reparations payments from Japan to Burma and Indonesia, each of which had been occupied by Japan during the war, were consistent with Article 14(a)1 of the 1951 Treaty. Thus, neither Burma nor Indonesia was granted "greater advantages" than they would have had under the 1951 Treaty.

(4) Japan's treaty with the **Soviet Union** (¶ 6) provides: "The USSR and Japan agree to renounce all claims by either State, its institutions or citizens, against the other State, its institutions or citizens, which have arisen as a result of the war since 9 August 1945 [when the USSR entered the war against Japan]." Thus, the waiver does indeed cover all claims, including those of nationals, arising out of the war between Japan and the USSR.

(5) Japan's treaty with **South Korea** (Art. II.1) states: "The Contracting Parties confirm that [the] problem concerning property, rights and interests of the two Contracting Parties and their nationals (including juridical persons) and concerning claims between the Contracting Parties and their nationals, including those provided for in Article IV, paragraph (a) of the Treaty of Peace with Japan signed at the city of San Francisco on September 8, 1951, is settled completely and finally." By its terms, the South Korea treaty also settles all South Korean nationals' claims arising out of the war.

(6) Japan's treaties with **Denmark** (Art. I); **Sweden** (Art. I); **Spain** (¶ 1); and **Switzerland** (Art. 1) specifically encompass all claims "for which the government of Japan is held responsible under International law." Under the Geneva Convention, "[t]he Detaining power shall assume entire responsibility for the maintenance, care, treatment and payment of wages of prisoners of war working for the account of private persons." 1929 Convention, Art. 28; 1949 Geneva Convention, Art. 57. Because the Government of Japan would be "held responsible under international law" for the treatment of those it held as prisoners of war, including for the payment of wages to prisoners of war that were

forced to perform labor for private entities, these treaties did resolve claims such as those of the Allied POWs. Further, none of these treaties provide for a waiver of war-related claims by Japan or Japanese nationals against these governments or their nationals, so none provided the benefits that the United States obtained for itself and its nationals under Article 19 of the 1951 Treaty. Finally, it should be noted that none of these countries was at war with Japan during World War II. Thus, any comparison of their treaties with that between Japan and the United States is inappropriate.

(7) Japan's treaty with the **Republic of China ("Taiwan")** (Art. III) states: the "property of such authorities and residents [of Taiwan] and their claims \* \* \* against Japan and its nationals, shall be the subject of special arrangements between the Government of the Republic of China and the Government of Japan," and further provides (Art. XI) that "any problem arising between the Republic of China and Japan as a result of the existence of a state of war shall be settled in accordance with the relevant provisions of the San Francisco Treaty." Plainly, this treaty also does not provide for private suits on claims arising out of the war.

(8) **The People's Republic of China:** At the time of the 1951 Treaty, the United States recognized the Republic of China rather than the People's Republic of China as the legal representative of the Chinese people. Consistent with this policy, the Senate, in considering whether to ratify the 1951 Treaty, insisted that Japan make a peace treaty with the Republic of China, rather than the People's Republic of China. Japan did so, as described above. In the wake of President Nixon's "opening" to the People's Republic of China, Japan sought to normalize relations. Japan and the PRC, while not signing a formal peace treaty, agreed to a "Joint Communiqué," in which (Art. 1) they terminated the "abnormal state of affairs that ha[d] hitherto existed between Japan and the People's Republic of China." In the Joint Communiqué (Art. 5), the PRC expressly renounced its demand for war reparations from Japan. The Treaty of Peace and Friendship between China and Japan, signed on August 12, 1978, incorporated and formalized the terms of the Joint Communiqué.

Plainly, having insisted upon Japan concluding its treaty with the Republic of China rather than People's Republic of China, the United States could not now find fault with Japan for having done so. Moreover, to the extent that one believes Japan's treaty with the PRC is relevant to Article 26, it should be noted that it does not provide for litigation of private claims, and, like Japan's treaties with Denmark, Sweden, Spain, and Switzerland, it provides no waiver of claims by Japan and its nationals such as the United States obtained in Article 19 of the 1951 Treaty.

**RESPONSE OF THE DEPARTMENTS OF STATE AND JUSTICE  
TO QUESTIONS RAISED DURING THE SEPTEMBER 25, 2002  
HEARING BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON  
IMMIGRATION, BORDER SECURITY, AND CLAIMS**

The Departments of State and Justice submit this statement in response to questions posed by Committee members at the Hearing on H.R. 1198 – Justice for U.S. Prisoners of War Act of 2001 – held September 25, 2002. In particular, the administration responds below to the written opinions of three academics, Professors Maier, Ramsey, and Rogers, who express the view that the 1951 Treaty of Peace with Japan does not preclude American prisoners of war from litigating claims concerning the labor they were forced to perform for Japanese companies during their captivity in World War II.

At the outset, we note that the United States has to a large extent addressed the substance of these arguments in its amicus filings submitted to the courts where the POWs claims are pending.<sup>1</sup> In the courts, each side has had the opportunity to fully develop its legal arguments before the judges who are assigned by the Constitution to determine finally "what the law is." To date, each court that has finally ruled on the meaning of the 1951 Treaty has rejected the theories advanced by the professors and concurred, instead, with the interpretation offered by the Executive Branch. See In re World War II Era Japanese Forced Labor Litig., 114 F. Supp. 2d 939, 945 (N.D. Cal. 2000) ("To avoid the preclusive effect of the treaty, plaintiffs advance an interpretation of Article 14(b) that is strained and, ultimately, unconvincing."); Loe v. Japan, 172 F. Supp. 2d 52, 67 (D.D.C. 2001) (noting that by signing and ratifying the Treaty, the Philippines had "settled" the claims of its nationals"); Aldrich v. Mitsui & Co. (USA), Case No. 87-912-Civ-J-12, slip op. at 3 (M.D. Fla. Jan. 20, 1988) ("The plain language and structure of the Treaty support defendant's argument"). Thus, plaintiffs have "had their day in court," but their arguments have not prevailed.

Professors Maier, Ramsey and Rogers offer various, often contradictory, theories as to why the Treaty should not be read as waiving the plaintiff POWs' claims. None of these theories is convincing. Each relies upon inserting words into the Treaty that do not appear there or ignoring the words that do. Contrary to the professors' contentions, there is nothing unusual or problematic in governments settling the war-related claims of their nationals. Finally, the professors' arguments, if accepted, would prove too much. They would frustrate entirely the Treaty's goal of providing a comprehensive settlement of all war-related claims and would, moreover, establish a dangerous precedent that could well hinder the United States' ability to enter into peace treaties to end armed conflicts in the future. We address below the principal reasons why the professors' theories are incorrect.

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<sup>1</sup> The United States' position has been authoritatively stated in the briefs filed by the United States, with the authorization of the Solicitor General.

Article 14(b)

The interpretation of the 1951 Treaty's waiver provision must, of course, begin with the language of the Treaty itself. Article 14(b) states:

Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.

Art. 14(b). As Judge Walker noted, this language is "strikingly broad." In re World War II Era Japanese Forced Labor Litig., 114 F. Supp. 2d at 945. By the Treaty's express terms, the Allied Powers waived not only their own claims but "those \* \* \* of their nationals" as well. Further, the Allies waived, for themselves and their nationals, more than just a narrow subset of claims, such as claims arising under international law, but "all \* \* \* claims \* \* \* arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." The plain meaning of this language necessarily encompasses all claims relating to the treatment of Allied prisoners of war by Japanese nationals during the prisoners' captivity. Claims such as plaintiffs' suits for unpaid wages and injuries at the hands of the employers for whom they were forced to work clearly "arise out of" Japan's prosecution of the war: its capture of the POWs; its decision to intern them rather than release them; its decision to force them to work; its decision to assign them to labor for private entities. Plaintiffs' claims arose only because of these acts by Japan in the course of prosecuting the war. Moreover, under international law, Japan remained solely responsible for ensuring that POWs were paid and not mistreated. See 1929 Geneva Convention, Art. 28 ("The Detaining power shall assume entire responsibility for the maintenance, care, treatment and payment of wages of prisoners of war working for the account of private persons." (emphasis added)).<sup>2</sup> Indeed, Japan's failure to fulfill its obligations under the laws of war was also an "action taken in the course of the prosecution of the war."

If the waiver's language left any doubt, other provisions of the Treaty and its implementing legislation confirm that the claims of POWs relating to their forced labor were within the scope of Article 14(b)'s waiver provision. Article 11 of the Treaty expressly incorporates the judgment of the

<sup>2</sup> For purposes of comparison, it should be noted that under the system established by the United States during World War II, the private companies for which Japanese prisoners of war labored did not pay wages directly to the POWs. Rather, the private entity contracted with the United States for POW labor, see United States v. Adam Packing Ass'n, Inc., 197 F.2d 33, 34 (5th Cir. 1952), and the United States, in turn, paid the POWs' wages. This is further evidence that the United States understood that the payment of POW wages cannot be divorced from the government's prosecution of the war.

International Military Tribunal for the Far East (the "Tokyo War Crimes Tribunal"), which specifically found that Japan had "employ[ed] prisoners of war to aid in the prosecution of the war," in such jobs as mining, stevedoring, and the replacement of industrial workers. *See* The Tokyo Judgment, Vol. I, at 414. This confirms that the Treaty drafters understood that claims relating to POW labor were within the scope of the waiver in Article 14(b).

Moreover, under the Treaty and its implementing legislation, Allied prisoners of war received compensation paid from assets seized from Japanese corporations. Under Article 16 of the Treaty, forfeited assets of Japan and Japanese nationals (including corporations) located in countries that were neutral during the war or that had fought against the Allies were used to compensate Allied prisoners of war for their war-related injuries. Likewise, after the Senate had ratified the Treaty, it amended the War Claims Act to allow payment of additional compensation to prisoners of war who had suffered specified violations of the Geneva Convention, including claims "relating to labor of prisoners of war." *See* 50 U.S.C. App. § 2005(d)(2)(A). These payments came from assets seized from Japan and Japanese corporations pursuant to Article 14(a)(2) of the 1951 Treaty. Congress did so in recognition of the fact that the POWs' claims had been settled and waived. Documents produced in discovery during the POW litigation reveal that many of the named plaintiffs received payments from the War Claims Fund based upon the labor they were forced to perform in violation of the Geneva Convention. In total, 178,900 American servicemen received payments totaling \$73,492,926 relating to forced labor and inhumane treatment during their captivity. *See* Foreign Claims Settlement Commission of the United States, Second Semiannual Report to the Congress.<sup>3</sup> Thus, American POWs, including many of the plaintiffs, received compensation for their forced-labor claims out of assets seized from Japanese corporations as authorized under the 1951 Treaty.<sup>4</sup>

The professors' attempts to avoid this necessary conclusion are unconvincing. Professor Ramsey contends that Article 14(b) only waives the claims of Allied nationals against Japanese

<sup>3</sup> A soldier captured at Bataan who survived through the war and was forced to perform labor would have been eligible for a total payment under the War Claims Act – including the \$1.50 a day program and the separate \$1 a day program for inadequate food rations, *see* 50 U.S.C. App. § 2005(b), (d) – of roughly \$3,100. The present-day value of this payment is over \$20,000. Payments recently made by the German government and German industry under the German Foundation to victims of the Nazi's slave labor practices amounted to roughly \$7,000.

<sup>4</sup> Dr. Lester Tenney, a POW survivor who testified at the September 25 hearing on H.R. 1198, stated that he did not recall having been paid under the \$1.50 a day program relating to forced labor and inhumane treatment. *See* Tr. of Hearing, 68. A review of documents at the Foreign Claims Settlement Commission of the United States (successor to the War Claims Commission) indicates that Dr. Tenney did receive payment under the \$1.50 a day program relating to forced labor as well as the \$1 dollar a day program relating to inadequate food rations. (A copy of the payment record is attached.)

nationals that "act[ed] as agents of, or otherwise under the control and direction of, the Japanese government." Professor Ramsey draws this conclusion from his understanding that "the phrase 'prosecution of the war' can only refer to governmental actions." Professor Ramsey's interpretation cannot, however, be squared with the language of Article 14(b). First, it would render superfluous the phrase "and its nationals." If Professor Ramsey were correct, the Treaty would mean precisely the same thing if it had only waived claims "arising out of any actions by Japan in the course of the prosecution of the war." Moreover, even if the Professor were correct, plaintiffs' forced labor claims would still come within the waiver. As demonstrated above, plaintiffs' claims, though asserted against private entities, plainly do "arise out of" Japan's prosecution of the war.

Professor Maier contends that the Allies did not, in fact, waive their nationals' claims at all, but, rather, "waived their respective rights to espouse in the future the claims of their respective nationals arising out of the prosecution of the war." (Emphasis added.) The language of the Treaty is to the contrary. It speaks not of "rights to espouse," but states that the Allies "waive all \* \* \* claims of \* \* \* their nationals" arising out of the war's prosecution. The Senate understood these words to mean what they say. See S. Exec. Rep. No. 82-2 (1952), at 13 (noting that in the Treaty the Allies "waive their claims and those of their nationals"). Professor Maier contends that the insertion of the phrase "right to espouse" is necessary because a government cannot "waive" its national's claim "until the government espouses the injured individual's claim." However, Professor Maier cites no authority for the implicit premise that the government must make a formal declaration of espousal separate and apart from the act of espousal. A long line of Supreme Court decisions clearly establishes the broad authority of the federal government to espouse and compromise the claims of its nationals. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 679-80 (1981) ("nations have often entered into agreements settling the claims of their respective nationals"). That is what the United States did in the 1951 Treaty of Peace. Article 14, in addition to waiving claims, also authorized the United States to seize Japanese assets worth, in 1952, an estimated \$ 90 million dollars. And, as noted, the POWs were substantially compensated out of the proceeds from these very assets. As the Senate explicitly realized, it was "the duty and responsibility of each [Allied] government to provide such compensation for persons under its protection as that government deems fair and equitable" out of the seized assets. S. Exec. Rep. No. 82-2 (1952), at 13.

Professor Rogers argues that Article 14(b) should be construed not to waive nationals' own claims, but rather international law claims of the government based upon injuries to its nationals. See Rogers, ¶ 4 (waiver "extends only to international claims in respect of nationals"). This is a variation on Professor Maier's "espousal" theory, and it similarly requires the addition of language that does not appear in the Treaty. Also, like the Maier theory, the basis for Professor Rogers' conclusion – the purported rule that "[a] private individual's claim under domestic law cannot be 'waived' by the state, because it is not the state's claim under the domestic legal system" – is inconsistent with judicial precedent. The Supreme Court has stated that the power of governments to settle the claims of their respective nationals against their wishes is necessary because, "[n]ot infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are

"sources of friction." *Dames & Moore*, 453 U.S. at 679. The Court has also recognized that domestic law claims by the citizens of one country against those of another may be just as much a "source of friction" as claims against a foreign government itself. See *United States v. Pink*, 315 U.S. 263, 225 (1942) (noting that "the existence of unpaid claims against Russia and its nationals which were held in this country \* \* \* had long been one impediment to resumption of friendly relations between these two great powers" (emphasis added)). Many of these decisions use the language of "waiver" such as that employed in the 1951 Treaty. See, e.g., *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1523 (D.C. Cir. 1984) (government "may compromise [espoused claim], seek to enforce it, or waive it entirely"), *cert. denied*, 470 U.S. 1051 (1985); See Restatement (Second) of Foreign Relations Law of the United States § 213 (1965) (President "may waive or settle a claim against a foreign state \* \* \* [even] without the consent of the [injured] national"). Professor Rogers' theory would, if adopted, undermine this recognized and critical foreign relations power. Any international law claim can be recharacterized as one based on domestic law, and the POW litigation is a case in point. Professor Rogers' theory would frustrate governments' attempts to eliminate such "sources of friction" and "impediment[s] to resumption of friendly relations."

Moreover, Professor Roger's interpretation of the word "waive" cannot be squared with the use of that word in Article 19(a) of the 1951 Treaty. In Article 19(a), "Japan waives all claims of Japan and its nationals against the Allied Powers and their nationals arising out of the war." By its express language, this Article "waives \* \* \* claims of [Japanese] nationals against [Allied] nationals." As Professor Rogers acknowledges in his opinion, the waiver of national-vs-national claims cannot refer to "international law claims" because "[a]n international law claim \* \* \* is a claim between nation-states." Thus, the term "waives" in Article 19(a) necessarily encompasses domestic law claims, because these are the only kind of national-vs-national claims that exist. If the term "waives" was intended to include domestic law claims in Article 19(a), then that same term should be understood to include domestic law claims when it is used in an almost identical circumstance in Article 14(b).

Finally, it must be observed that any imputed limitation on the United States' ability to waive the claims of its nationals against Japan and its nationals would imply a similar limitation on the ability of Japan to waive the claims of its nationals. In other words, under Professor Maier and Roger's theories, Japan did not actually "waive[]" all claims" of its nationals against the United States and American nationals arising out of the war, but only waived Japan's right to espouse those claims (Maier) or waived Japan's own international law claims based upon individual injury (Rogers). Thus, Japanese nationals would remain free to sue the United States and U.S. nationals in Japanese or American courts on claims arising out of the war. This is definitely not the view of the Department of State or the Department of Justice. Moreover, it would be entirely inconsistent with the expressed intent of the parties to "settle questions still outstanding as a result of the existence of a state of war between them." 1951 Treaty, Preamble.

#### Article 19

Professor Ramsey argues that differences between the language of Article 14(b) and Article 19, by which Japan waived war-related claims against the Allies, indicate that prisoner of war claims do not come within the scope of Article 14(b). As an initial matter, because the language of Article 14(b) is itself unambiguous, Article 19 cannot be used to introduce ambiguity to it. The fact that Japan's waiver of claims was phrased in a manner distinct from that of the Allies' does not alter Article 14(b)'s waiver of "all" claims of Allied nationals arising out of "any" action of Japan and Japanese nationals in the course of the prosecution of the war. Indeed, distinctions in the language of the two provisions are only to be expected given the dissimilar positions of the United States and Japan which, for example, also had to waive claims against the Allies that arose after the war and during the United States' six-year occupation of Japan, such as claims relating to the alleged misuse of Japanese POWs' forced labor after the cessation of hostilities. Contrary to Professor Ramsey's suggestion, see page 4 of Professor Ramsey's September 23, 2002 Statement, the State Department's contemporaneous discussion of the Treaty's language indicates that it understood the phrases "in the course of the prosecution of the war" and "arising out of the war" to mean roughly the same thing. See *Foreign Relations of the United States, 1951, Vol. VI, 1084* (stating that purpose of Allied waiver that became Article 14(b) was to "settle and dispose of all claims of the Allied Powers and their nationals arising out of the war").

Professor Ramsey further argues that the express reference to POW claims in Article 19(b) implies that POW claims are outside the scope of Article 14(b). Article 19(b) states that "[t]he foregoing waiver [in 19(a)] includes \* \* \* any claims and debts arising in respect to Japanese prisoners of war and civilian internees in the hands of the Allied Powers." Professor Ramsey contends that this implies that POW claims were not included within the scope of Article 14(b).<sup>5</sup> We believe that, to the extent any inference about 14(b) can be drawn from 19(b), the contrary inference is more appropriate. Article 19(b) specifically states that POW claims are "include[d]" in the general waiver of 19(a), not that they were "in addition" to that waiver. Thus, the Treaty language leaves no doubt that the drafters believed that POW claims did fall within the scope of a general waiver provision.

#### Constitutional Limitations

Professor Ramsey, alone among the three academics, asserts that Article 14(b) should be read not to encompass national-vs-national claims in order to avoid a need for the United States to pay compensation for the waived claims under the Fifth Amendment to the Constitution. This argument fails in three respects. First, even if it were necessary for the United States government, under U.S. domestic law, to pay compensation for the value of the waived claims, that would not be a basis for

<sup>5</sup> The logic of Professor Ramsey's argument based upon Article 19(b) would mean that POW claims are wholly excluded from Article 14(b)'s waiver and that POWs were therefore free to bring suit not only against Japanese nationals but also against the Japanese government as well. Notably, the POW plaintiffs do not go this far, but have instead frequently emphasized that they seek only the right to bring claims against Japanese nationals, not the government.

failing to give an international agreement among nearly fifty nations its natural effect. At the most, it would mean that the POW's had a claim against the United States, not against the Japanese. Second, the espousal and compromise of plaintiffs' war-related claims did not constitute a "taking" for Fifth-Amendment purposes. *See, e.g., Belk v. United States*, 858 F.2d 706, 708-09 (Fed. Cir. 1988); *Shanghai Power Co. v. United States*, 4 Ct. Cl. 237 (1983), *aff'd*, 765 F.2d 159 (Fed. Cir. 1985) (settlement of claims against a foreign government does not give rise to an obligation under the Fifth Amendment to make compensation). Third, even assuming that compensation were required, plaintiffs have been compensated by the United States for their settled claims in amounts intended to take into account both the value of their labor and their injuries. The Geneva Convention provides that wages for POWs are to be "fixed by agreements between" the warring nations, 1929 Geneva Convention, Art. 34, and in the absence of an agreement, POWs are to be paid the same as the detaining power's soldiers engaged in similar work or at "a rate in harmony with the work performed," *id.* The practice of the United States was to pay enemy POWs held in camps in the United States \$21 per month, the equivalent of pay for the lowest ranks of the U.S. military. *See* U.S. Department of the Army, *History of Prisoner of War Utilization by the United States Army, 1776-1945*, Department of the Army Pamphlet No. 20-213, 1955, at 77. However, Japanese soldiers held by the United States in POW camps in the Pacific were paid as little as 6 cents per day, less than \$ 2 per month, reflecting the low wages prevailing in the area. *See id.* at 256. Under the War Claims Act, in addition to payments relating to inadequate food provisions, prisoners of war were eligible to receive from seized Japanese assets \$1.50 for each day that they asserted labor-related claims (roughly \$45 per month). *See* 50 U.S.C. App. § 2005(d).

#### Article 26

Professor Maier further argues that if the Treaty waived the POWs' claims against Japanese nationals, those claims have sprung back to life as a result of Japan's having made treaties with other nations that did not settle national-to-national claims and the United States being entitled to the same treatment pursuant to Article 26 of the Treaty.<sup>6</sup> This argument rests upon mistakes of fact as well as a misunderstanding of Article 26 and of the "advantages" obtained by the United States in the 1951 Treaty.

The seven agreements that are mentioned by Professor Maier can be divided into two groups, those that purportedly allow the litigation of claims such as the POWs' forced labor claims, and those

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<sup>6</sup> Article 26 provides that, "[s]hould Japan make a peace settlement or war claims settlement with any State granting that State greater advantages than those provided by the present Treaty, those same advantages shall be extended to the parties to the present Treaty."

that purportedly gave greater monetary advantages to another country.<sup>7</sup> We address each group in turn.

A. Four of the countries that Professor Maier cites – Denmark, Sweden, Switzerland and Spain – entered treaties with Japan that are nearly identical to each other. The most notable fact about these treaties is that these countries were not at war with Japan during World War II. Any comparison of these treaties with that of the 1951 Treaty is, therefore, like comparing apples to oranges. It would be odd indeed if the ability of Allied prisoners of war to litigate their claims turned upon whether treaties between Japan and other nations with which Japan was not at war also foreclosed prisoner of war claims. Professor Maier's reliance on these treaties is curious for a further reason as well: each does, in fact, settle all claims "for which the government of Japan is held responsible under International law." As previously noted, under the Geneva Convention, "[t]he Detaining power shall assume entire responsibility for the maintenance, care, treatment and payment of wages of prisoners of war working for the account of private persons." 1929 Convention, Art. 28. Thus, prisoners of war from these countries (if there were any) would be precluded from litigating claims relating to their captivity.

In the treaty between Japan and the Soviet Union, each government "renounce[s] all claims by either State, its institutions or citizens, against the other State, its institutions or citizens, which have arisen as a result of the war since 9 August 1945." Professor Maier observes that the waiver only applies to claims arising after August 9, 1945, but this is hardly surprising in light of the fact that the U.S.S.R. only entered the war against Japan as of that date. Thus, the waiver does indeed cover all claims arising out of the war between Japan and the USSR.

Even if these treaties had not settled their nationals' prisoner of war claims, this would still not be a basis for invoking Article 26. Article 26 can only be invoked if Japan enters a "war claims settlement with any State granting that State greater advantages" than provided in the 1951 Treaty. Professor Maier does not, in fact, maintain that these other treaties "settled" POW "war claims" on better terms, but that they failed to settle POW claims. For purposes of Article 26, the failure of another treaty to address private claims (as opposed, for example, to an explicit provision allowing private claims to go forward in court) is the same as if there had been no treaty at all. Plainly, Article 26 does not provide for waived claims to spring back to life simply because Japan fails to enter into a claims settlement with another country.

Finally, it should be noted that none of the treaties between Japan and Denmark, Sweden, Switzerland or Spain contain any waiver of claims by Japan and Japanese nationals against those four

<sup>7</sup> Although Professor Maier states that there are "eight" agreements that he believes conferred greater advantages, he discusses only seven in his opinion. Copies of the agreements that have been cited by the plaintiffs during the course of the litigation as providing "greater advantages" than the 1951 Treaty are provided as attachments to the further analysis of Article 26 provided herewith.

governments or their nationals. Thus, none of those treaties provide to those countries the crucial benefits obtained by the United States for itself and its nationals in Article 19. The absence of a reciprocal waiver of national-vs-national claims would render these treaties less advantageous than the 1951 Treaty was for the United States.

B. Professor Maier's reliance upon the treaties with Burma and the Netherlands presumably relates to the monetary benefits obtained by those countries because each of these countries is bound by the same waiver provision as applies to the United States and American nationals. The Netherlands is a party to the 1951 Treaty and, thus, is bound by the terms of Article 14(b). The Treaty between Japan and Burma also contains a waiver provision identical to that of Article 14(b) of the 1951 Treaty. *See* Treaty of Peace Between the Union of Burma and Japan, Nov. 5, 1954, Art. V.2 ("the Union of Burma waives all claims of the Union of Burma and its nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war"). Presumably, then, Professor Maier is referring to Japan's payment of additional monies to these governments. Subsequent to the 1951 Treaty, Japan made a voluntary payment of \$10 million to the government of the Netherlands in recognition of the suffering of Dutch civilian internees during the war.<sup>8</sup> In its treaty with Burma, Japan promised to make reparations to Burma in the form of Japanese goods and services worth approximately \$20 million per year for ten years. *Id.* Art. VI(a)(II).

These payments do not provide a basis for the United States to invoke Article 26. The Japanese government's payment to the Dutch was, as the parties acknowledged, a voluntary payment by which the Japanese recognized that Dutch civilian internees, who had been living in Indonesia at the time of the war, had suffered as much as the Allied POWs. However, unlike POWs who were provided for in Article 16, no special provision had been made for compensating civilian internees. Because there were inadequate Japanese assets in the Netherlands to compensate these victims, Japan made a voluntary payment as a gesture of goodwill. This is wholly outside the terms of Article 26. With respect to the payments from Japan to Burma, it should be noted that the 1951 Treaty of Peace had itself contemplated that Japan would make arrangements with those nations that it had occupied during the war "to compensate those countries for the cost of repairing the damage done, by making available the services of the Japanese people in production, salvaging and other work for the Allied

<sup>8</sup> In a letter sent by the Japanese Prime Minister to the Dutch Ambassador, Japan made clear that the payment was voluntary and that Dutch nationals could not obtain satisfaction on their claims in court. *See* Letter dated September 8, 1951, from Prime Minister Shigeru Yoshida of Japan to Dirk Stikker, Minister of Foreign Affairs of the Netherlands ("the Japanese Government points out that, under the Treaty, Allied nationals will not be able to obtain satisfaction regarding [their private] claims, although, as the Netherlands Government suggests, there are certain types of private claims by Allied Nationals which the Japanese Government might wish voluntarily to deal with"). (We attach a copy of the exchange between Prime Minister Yoshida and Foreign Minister Stikker.)

Powers in question." Art. 14(a)1.<sup>9</sup> Because Burma had been occupied by Japan during the war, the provision for assistance to Burma in the Burmese Treaty did not grant it "greater advantages" than it would have had under the 1951 Treaty. These treaties do not establish a basis for allowing litigation of Allied nationals' claims waived by the Treaty.

The State Department has never concluded that any of Japan's other post-war treaties conferred "greater advantages" as that term is used in Article 26. In fact, many of the treaties were negotiated with the United States' support, encouragement, and, in some cases, direct involvement.<sup>10</sup> For the United States now to invoke these treaties as the basis for permitting POW claims to go forward against Japanese nationals would open the United States to charges of bad faith.

#### Conclusion

In sum, the professors' arguments are the same ones asserted by the plaintiff POWs in their lawsuits that have been considered and rejected by each of the United States courts that has ruled on the Treaty's application. By asking Congress to act on the basis of these opinions, plaintiffs are, in effect, asking Congress to overrule the courts' legal conclusions as to the meaning and effect of the Treaty. If Congress were to take up plaintiffs' invitation to abrogate the Treaty, whether outright or under the guise of invoking Article 26, it would undoubtedly reopen the whole range of issues settled by the Treaty of Peace. The 1951 Treaty has been the foundation of the United States' foreign policy in the Pacific for half a century. It should be left intact.

<sup>9</sup> This provision was added to ensure that Japan, rather than the United States and its Allies, bore the burden of rebuilding those areas that had been occupied by Japan during the war. Payments made in accordance with this provision to other nations as well, such as the Philippines and Vietnam, which were referenced by Representative Rohrabacher in his testimony, would likewise not form a basis for invoking Article 26.

<sup>10</sup> See, e.g., Memorandum of Discussion at the 214<sup>th</sup> Meeting of the National Security Council Held on Sunday, September 12, 1954, reprinted in Foreign Relations of the United States 1952-1954, Vol. XII, East Asia and the Pacific, Part 1, at 907 (1977) (Dulles reporting to the National Security Council his efforts to convince the Japanese Government to accept Burma's proposal for a war claims settlement); Memorandum of Conversation, Department of State, Washington, May 17, 1956, reprinted in, Foreign Relations of the United States, 1955-1957, Vol. XXII, Southeast Asia, at 271 (noting that the United States has "encouraged and will continue to encourage the Japanese to restore normal relations with the Indonesians by a proper settlement of the reparations issue"); Memorandum of Conversation, by the Secretary of State, April 29, 1952, reprinted in id. at 1260 (emphasizing "the great importance which the United States attached to the establishment of firm and friendly relations between Korea and Japan, and the profound influence which the character of these relations would exercise over the stability of the Far East").